ATTORNEY'S HANDBOOK: Representing Clients Under California's Sexually Violent Predator Act

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Disclosure: This Handbook is to help attorneys set a foundation on how to represent their clients under the SVPA law. Attorneys are expected to do their own due diligence and verifications before using any material within this Handbook.

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SECTION 1: OVERVIEW OF THE SEXUALLY VIOLENT PREDATOR ACT

A. Introduction

California's Sexually Violent Predator Act, codified at Welfare and Institutions Code sections 6600 through 6610 (hereinafter "SVPA"), establishes a civil commitment scheme for individuals who, upon completion of a prison sentence, are determined to pose a continuing danger to the public by reason of a diagnosed mental disorder that predisposes them to commit sexually violent crimes. While the commitment is civil in nature, its consequences — potentially indefinite detention in a locked state hospital — are as severe as any criminal sentence. Accordingly, attorneys representing individuals subject to SVPA proceedings must approach their representation with the same rigor, preparation, and adversarial commitment they would bring to a capital case.

This handbook is designed to provide attorneys who are unfamiliar with the SVPA a comprehensive foundation: from the constitutional underpinnings of the law, through the procedural stages of commitment, to the critical areas where competent representation can and does make a difference.

B. Legislative Background and Purpose

The SVPA was enacted in 1995 and took effect January 1, 1996. The Legislature acted out of a stated concern about a specific and identifiable class of criminal offenders: those who are extremely dangerous as a result of mental impairment and who are likely to continue committing acts of sexual violence even after they have served their criminal sentences. As the Court in *People v. Field* (2024) 106 Cal.App.5th 132 explains, the Legislature found that this select group of offenders posed a recurring threat to the public that existing criminal and civil commitment structures were inadequate to address.

In enacting the SVPA, the Legislature made several express findings. It found that sex offenders who predatorily target strangers or persons of casual acquaintance represent a substantial danger to public health and safety. It found that the prognosis for treating such individuals is poor under conventional approaches, that their treatment

needs are long-term, and that they are likely to reoffend upon release without intensive and sustained intervention. And it found that existing civil commitment procedures — designed for short-term psychiatric stabilization — were not suited to address the risks posed by this population.

The Act was designed not as punishment but as a civil, therapeutic response to mental disorder. The SVPA's stated purpose is to provide treatment for the diagnosed mental disorder from which SVPs suffer and to reduce the threat of harm otherwise posed to the public. This nonpunitive purpose has been consistently affirmed by the courts and is central to the Act's constitutional framework.

> *"The Legislature indicated that to the extent such persons are currently incarcerated and readily identifiable, commitment under the SVPA is warranted immediately upon their release from prison."*
> *— People v. Field (2024) 106 Cal.App.5th 132, summarizing legislative findings; see also Welf. & Inst. Code, § 6600, Legislative findings.*

C. Constitutional Foundation: The United States Supreme Court

Before examining California's specific statutory scheme, it is essential to understand the constitutional framework within which all SVP laws operate. Two United States Supreme Court decisions form that foundation.

1. Kansas v. Hendricks (1997)

Kansas v. Hendricks 521 U.S. 346 (1997)

Background: The modern era of sexually violent predator civil commitment laws began with *Hendricks*. Leroy *Hendricks* was a convicted sex offender with a lengthy history of child molestation who, upon his scheduled release from prison, was subject to commitment under Kansas's newly enacted Sexually Violent Predator Act. *Hendricks* challenged the law on multiple constitutional grounds, arguing that it violated the Due Process Clause, the Double Jeopardy Clause, and the Ex Post Facto Clause of the United States Constitution.

Holding: The Supreme Court upheld the Kansas law in a 5–4 decision. Civil commitment of a mentally disordered individual who poses a danger to others does not violate substantive due process, provided that commitment is linked to a finding of both dangerousness and a mental abnormality or personality disorder making it difficult for

the person to control their behavior. The mere fact of a prior conviction is insufficient, standing alone, to justify indefinite civil detention. The Court also rejected the double jeopardy and ex post facto arguments, holding that the Act was civil, not punitive, in nature — its stated purpose was treatment and incapacitation, not punishment.

Defense Significance: *Hendricks* simultaneously authorized civil commitment and placed meaningful constitutional limits on it. The requirement of a qualifying mental condition that links the diagnosed disorder to dangerousness is not a formality — it is a constitutional prerequisite. An evaluation that fails to establish this nexus is constitutionally defective, not merely methodologically weak. Defense counsel should treat the disorder-to-dangerousness nexus as a distinct and independently required element, not an assumption that flows automatically from the diagnosis.

2. Kansas v. Crane (2002)

Kansas v. Crane 534 U.S. 407 (2002)

Background: Five years after *Hendricks*, the Supreme Court returned to the issue in *Crane*, a case that significantly refined the constitutional requirements for SVP commitment. Michael *Crane* had been committed under the Kansas SVP Act, and the Kansas Supreme Court reversed his commitment on the ground that the state was required to prove that he could not control his dangerous behavior at all. The United States Supreme Court reversed the Kansas Supreme Court's absolute-control requirement, but nonetheless imposed an important constitutional limitation.

Holding: While the Constitution does not require proof of a complete or total inability to control behavior, the Due Process Clause requires proof of serious difficulty in controlling behavior. Without this volitional impairment finding, there is no meaningful distinction between an SVP commitment and ordinary criminal punishment based solely on the fact of a prior conviction and a prediction of future dangerousness.

Defense Significance: *Crane* is an enormously important case. In practice, evaluators frequently conflate the fact of prior sexual offenses with proof of volitional impairment. The logic often runs: "Mr. Doe committed these offenses despite knowing they were wrong and despite prior incarceration, therefore he cannot control his behavior." *Crane* signals that this kind of circular reasoning is constitutionally insufficient. The state must offer something more — clinical evidence that the individual's diagnosed mental disorder actually impairs the ability to control sexually violent behavior, not merely evidence of past offenses. Defense counsel should scrutinize every SVP evaluation specifically for whether the volitional impairment finding has genuine clinical support or is simply a restatement of the offense history.

D. California Supreme Court: Foundational Decisions

Building on the constitutional framework established by Hendricks and Crane, California's Supreme Court has issued several foundational decisions that define how the SVPA operates in this state. Every SVPA defense attorney must be familiar with the following cases.

1. Hubbart v. Superior Court (1999)

Hubbart v. Superior Court (1999) 19 Cal.4th 1138

Primary Issue: Whether the SVPA violates the federal or California Constitution.

Holding: The California Supreme Court upheld the SVPA against challenges under both the federal and state constitutions, applying the reasoning of *Hendricks* and finding that California's commitment scheme was civil rather than punitive in nature.

Defense Significance: *Hubbart* established the constitutional validity of the California scheme on its face and remains the baseline authority for the proposition that the SVPA, properly applied, is constitutional. Critically, however, *Hubbart*'s holding that the law is constitutional on its face does not foreclose challenges to unconstitutional applications of the law in individual cases. An evaluation that fails to satisfy the constitutional requirements *Hendricks* and *Crane* impose remains challengeable even after *Hubbart*.

2. People v. Superior Court (*Ghilotti*) (2002)

People v. Superior Court (Ghilotti) (2002) 27 Cal.4th 888

Primary Issue: The meaning of "likely" as used in the SVPA's statutory standard for commitment.

Holding: The Court rejected both extreme interpretations. "Likely" does not mean "more likely than not" — the state is not required to prove a greater-than-fifty-percent probability of reoffense. However, the Court equally rejected the notion that any non-trivial risk is sufficient. Instead, the Court defined "likely" to mean that the individual, as a result of their diagnosed mental disorder, presents a "substantial danger — that is, a serious and well-founded risk" of committing sexually violent predatory acts if released. *Ghilotti* also established the court's authority to review evaluations for material legal error and required evaluators to meaningfully address voluntary treatment alternatives.

Defense Significance: *Ghilotti* is critical for two reasons. First, the state's burden at commitment is lower than many clients expect: the People need not prove the person will probably reoffend, only that there is a serious and well-founded risk. Defense counsel must address this standard directly. Second, *Ghilotti* requires that evaluators meaningfully address whether a proposed voluntary treatment plan in the community

might sufficiently reduce the risk of reoffense — an avenue defense counsel should explore in every case. *Ghilotti* is also the foundation for the *Ghilotti* Motion practice addressed in Section 2 of this handbook.

3. Cooley v. Superior Court (*Marentez*) (2002)

Cooley v. Superior Court (Marentez) (2002) 29 Cal.4th 228

Primary Issue: The scope of the Probable Cause Hearing under the SVPA.

Holding: A probable cause hearing (PCH) under the SVPA must encompass all elements required for SVP commitment at trial — not merely some subset of those elements. The PCH is not a rubber stamp.

Defense Significance: *Marentez* is the foundational case on the PCH and is addressed in detail in Section 3 of this handbook. For present purposes, counsel who treats the PCH as a formality is rendering ineffective assistance. Every element of the SVP criteria must be contested at the PCH with the same rigor applied at trial.

4. People v. *Torres* (2001)

People v. Torres (2001) 25 Cal.4th 680

Primary Issue: Whether prior predicate offenses must themselves be predatory acts to support an SVP petition.

Holding: There is no requirement that the prior predicate offenses be predatory in nature. The predatory finding required by the statute relates to the evaluator's assessment of future behavior, not to the historical offenses.

Defense Significance: This distinction matters when reviewing evaluations. An evaluator who conflates the predatory nature of historical offenses with a forward-looking clinical analysis of likely future behavior is applying the wrong legal standard. Counsel should verify that the predatory finding is prospective and clinically supported, not merely a restatement of what happened in the past.

E. Definition of a Sexually Violent Predator

The SVPA defines a 'sexually violent predator' as a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is

likely that he or she will engage in sexually violent criminal behavior. (Welf. & Inst. Code, § 6600, subd. (a)(1).) Three elements must each be established:

1. The person has been convicted of a qualifying sexually violent offense against one or more victims;
2. The person has a currently diagnosed mental disorder; and
3. The diagnosed mental disorder makes the person likely to commit future predatory sexually violent acts.

A 'sexually violent offense' is defined in section 6600, subdivision (b), and encompasses felony violations of Penal Code sections 261 (rape), 262, 264.1, 269, 286 (sodomy), 287, 288, 288.5, and 289, as well as felony violations of sections 207, 209, and 220 committed with the intent to commit such offenses. The qualifying prior convictions may include current or prior convictions, including convictions in other jurisdictions, juvenile adjudications under specified circumstances, and prior findings of not guilty by reason of insanity for a qualifying offense.

The 'diagnosed mental disorder' required by the SVPA is defined broadly. Section 6600, subdivision (c) states that the term 'includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.' This definition deliberately encompasses a range of conditions that affect volitional capacity — not only classical psychiatric diagnoses — so long as the condition creates the required nexus between the disorder and the risk of sexually violent criminal conduct.

The word 'likely,' as used in the SVP definition, has been the subject of significant litigation. As the *People v. Field* (2024) 106 Cal.App.5th 132 court acknowledges, courts have interpreted it to mean a serious and well-founded risk — not merely a theoretical possibility — that the person will engage in sexually violent predatory criminal behavior if released. The proper instruction of a jury on the meaning of this term was, in fact, one of the issues raised in Field's appeal, underscoring the importance of this definitional element to the entire commitment determination.

> *"The applicable criteria consists of: (1) was the individual convicted of a qualifying sexually violent offense; (2) does the individual have a diagnosable mental disorder predisposing him to commit criminal sexual acts; and (3) is the individual likely to commit future predatory sexually violent acts."*
> *— People v. Field (2024) 106 Cal.App.5th 132 (summarizing the three-part SVP standard as applied to Field).*

F. The Four Criteria for SVP Commitment

Under WIC section 6600, the state must prove four distinct elements beyond a reasonable doubt before an individual may be civilly committed as a sexually violent predator. It is essential that defense counsel understand each element as a separate and independently required finding. The failure of proof on any single element defeats the commitment petition.

Criterion One: Conviction of a Qualifying Sexually Violent Offense

The individual must have been convicted of one or more "sexually violent offenses" as specifically defined in WIC section 6600(b). The statute enumerates specific Penal Code sections that qualify, including but not limited to rape under Penal Code section 261, sodomy under section 286, lewd acts on a child under section 288, and several others. Not every sex offense qualifies. The conviction must have resulted in a determinate prison sentence, though the statute provides for certain exceptions including prior findings of not guilty by reason of insanity and prior juvenile adjudications under specific conditions.

Counsel Must: Verify that the predicate conviction actually qualifies under the statute. This sounds basic, but errors in qualifying convictions appear in evaluations with some regularity, and a predicate offense that does not legally qualify as a sexually violent offense under the statute is a threshold defect that can and should be challenged before the PCH.

Criterion Two: A Currently Diagnosed Mental Disorder

The individual must currently have a diagnosed mental disorder, defined under WIC section 6600(c) as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others."

This definition is distinct from ordinary psychiatric diagnostic categories. A diagnosis under the DSM alone is not sufficient — the diagnosed condition must be one that predisposes the individual to criminal sexual acts. The nexus between the diagnosis and the predisposition is not assumed; it must be clinically established. Paraphilic disorders, certain personality disorders, and some mood or psychotic disorders may qualify, but only when the evaluator demonstrates how the specific diagnosis connects to the predisposition toward criminal sexual behavior.

Counsel Must: Scrutinize the diagnosis itself, the basis upon which it was made, and the evaluator's articulation of how the diagnosis predisposes the individual to sexually violent conduct. This is one of the most fertile areas for challenge in SVP proceedings and is addressed in detail in Section 4 of this handbook.

Criterion Three: Serious Difficulty Controlling Behavior (Volitional Impairment)

Following *Kansas v. Crane*, the state must demonstrate that the diagnosed mental disorder results in serious difficulty controlling the individual's sexually dangerous behavior. This is not merely a restatement of Criterion Two. It requires the evaluator to go beyond diagnosing a condition and to specifically demonstrate that the condition impairs the individual's ability to control their conduct in a legally and clinically meaningful way.

Counsel Must: Examine the evaluation carefully to determine whether the volitional impairment finding has independent clinical support or is merely circular reasoning — using the same historical offenses that established the diagnosis as self-evident proof that the person cannot control their behavior. This is the most commonly deficient element in SVP evaluations and the most frequently overlooked by defense counsel.

Criterion Four: Likelihood of Future Sexually Violent Predatory Criminal Behavior

The state must prove that, as a result of the diagnosed mental disorder and the resulting volitional impairment, the individual presents a substantial danger — a serious and well-founded risk — of engaging in sexually violent predatory criminal behavior if released. Per *Ghilotti*, this standard does not require proof that reoffense is more likely than not, but it requires something considerably more than a theoretical possibility.

The "predatory" element within this criterion is separately defined. Under WIC section 6600(e), "predatory" means acts directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization. The evaluation must specifically address whether future acts will be predatory in nature.

Counsel Must: Verify that the evaluation contains a distinct, forward-looking predatory finding with supporting clinical rationale. An evaluation that omits this analysis, or that rests the predatory finding solely on the nature of prior offenses rather than prospective clinical analysis, is facially deficient.

G. The SVPA Process: From Prison to Commitment and Beyond

Understanding the procedural pipeline of an SVPA case is essential for effective representation. The process involves multiple stages, each with its own legal standards, procedural requirements, and opportunities for defense intervention. An attorney who

understands only the PCH and trial is unprepared for the full scope of representation this law demands.

Stage 1: Screening and Initial Evaluation

The SVPA process begins while the individual is still serving a prison sentence. Pursuant to WIC section 6601, the California Department of Corrections and Rehabilitation (CDCR) screens inmates as they approach their release date, typically beginning approximately six months before the Earliest Possible Release Date (EPRD). If the CDCR determines that an inmate may meet the criteria for SVP designation, the case is referred to the Board of Parole Hearings (BPH), which conducts an initial screening through its Forensic Assessment Division (FAD).

If the FAD screening indicates the individual may qualify, the case is referred to the California Department of State Hospitals (DSH), which assigns two licensed clinical evaluators — board-certified psychiatrists or licensed psychologists — to independently evaluate the inmate. If both evaluators agree that the individual meets the SVP criteria, the Director of DSH recommends that the District Attorney in the county of the individual's last CDCR commitment file a petition for civil commitment. If the two evaluators disagree, two additional independent evaluators are assigned. All evaluations — both positive and negative — are transmitted to the District Attorney along with the referral.

Defense Note: Negative evaluations — those concluding the individual does not meet criteria — are as strategically important as positive ones. The District Attorney and the court are required to receive all evaluations. Counsel should obtain every evaluation, including prior evaluations from earlier referral cycles, as they often contain findings that contradict the current positive evaluation.

Stage 2: The Petition and Initial Court Review

Upon receiving the DSH recommendation, the District Attorney may file a petition for civil commitment in the Superior Court of the county of the individual's last CDCR commitment. Under WIC section 6601.5, the court must conduct an initial review of the petition to determine whether it states sufficient facts that, if true, would constitute probable cause to believe the individual is likely to engage in sexually violent predatory criminal behavior upon release.

This initial review is conducted on the petition itself — it is not an adversarial hearing. If the court finds the petition facially sufficient, it issues an order and the individual, who has now completed his prison sentence, is taken into custody pursuant to WIC section 6602 rather than being released on parole. He is transported to a county jail in the

county where the petition was filed, where he will remain pending the Probable Cause Hearing.

Defense Note: The individual is now being detained after the completion of his criminal sentence solely on the basis of a civil petition that has not yet been tested in any adversarial proceeding. The urgency of securing counsel and obtaining copies of all evaluations cannot be overstated. Delay at this stage costs the client weeks or months of additional detention before the PCH.

Stage 3: The Probable Cause Hearing

Under WIC section 6602, the court must conduct a Probable Cause Hearing (PCH) to determine whether there is probable cause to believe the individual is likely to engage in sexually violent predatory criminal behavior upon release. The PCH must commence within ten calendar days of the court's initial order, though continuances may be granted upon a showing of good cause.

As established by the California Supreme Court in *Cooley v. Superior Court* (*Marentez*), 29 Cal.4th 228 (2002), the PCH must encompass all four elements required for SVP commitment at trial. It is not a limited or perfunctory inquiry into a single element. The rules of evidence apply at the PCH. If the court finds probable cause, the individual is ordered to remain in custody pending trial and may be transferred to Coalinga State Hospital for housing and evaluation. If the court does not find probable cause, the petition is dismissed.

Defense Note: This is one of the most critical and most frequently mishandled stages of SVPA proceedings. An attorney who treats the PCH as a formality is potentially surrendering an opportunity to have the entire petition dismissed. *Ghilotti* Motions challenging the legal sufficiency of the evaluations, addressed in Section 2 of this handbook, should be filed and argued before or at the PCH. Individuals can spend years at Coalinga State Hospital in pretrial status because the SVPA does not impose a traditional speedy trial requirement.

Stage 4: The Commitment Trial

If probable cause is found, the matter proceeds to trial. Under WIC section 6603, the individual has the right to demand a jury trial. The jury must be unanimous in finding, beyond a reasonable doubt, that the individual meets all criteria for SVP commitment. If the jury is unable to reach a unanimous verdict, the case may be retried.

The individual has the right to be represented by counsel at trial, to retain or have appointed a mental health expert to conduct an independent evaluation, and to cross-examine the state's evaluators. Defense counsel, by contrast, may retain and present private experts. If the jury or court finds the individual to be an SVP beyond a

reasonable doubt, the individual is committed to the custody of DSH for an indeterminate term.

→ Civil Nature of the Proceeding

An SVP trial is a 'special proceeding of a civil nature' and is wholly unrelated to any criminal case. (*Moore v. Superior Court* (2010) 50 Cal.4th 802, 815.) This civil designation has significant procedural consequences. The rules of evidence apply. The California Code of Civil Procedure and the Evidence Code govern except where the SVPA provides otherwise. However, a number of procedural protections more commonly associated with criminal proceedings have been extended to SVP respondents because of the magnitude of the liberty interest at stake.

→ Jury Trial Right

Both the person named in the petition and the People have the right to demand a jury trial. (Welf. & Inst. Code, § 6603, subds. (a), (b).) If neither party demands a jury trial, the matter is tried before the court. The jury verdict must be unanimous. The constitutional significance of this requirement is substantial: the California Supreme Court has held that the right to a jury trial in SVP proceedings implicates a fundamental liberty interest that triggers heightened equal protection scrutiny in certain contexts. (See *People v. McKee* (2010) 47 Cal.4th 1172.)

→ Burden of Proof

The People bear the burden of proof at trial and must establish beyond a reasonable doubt that the person is a sexually violent predator within the meaning of Welfare and Institutions Code section 6600. This is the highest standard of proof known to California law. The beyond-a-reasonable-doubt standard reflects the drafters' recognition that SVP commitment — though nominally civil — results in an indefinite deprivation of liberty that demands the most demanding evidentiary threshold.

→ Expert Testimony

Because the primary question at trial is not whether the person committed past acts but whether the person's current mental disorder makes future sexually violent predatory conduct likely, expert testimony is critical and in most cases determinative. Both parties may call DSH-designated evaluators to testify at trial. As the California Supreme Court clarified in *People v. Needham* (2024), the People may also call privately retained experts to testify — to contest other witnesses' testimony and to offer an independent SVP opinion — though such experts may not compel a pre-trial interview of the defendant. Defense counsel is entitled to an independent expert evaluation and, for indigent respondents, to appointment of an expert at public expense.

H. The Field Court's View on Compelled Testimony

A central issue in *People v. Field* (2024) 106 Cal.App.5th 132 was whether a person subject to SVP commitment proceedings could be compelled to testify against himself at trial. Field argued that because persons found not guilty by reason of insanity (NGIs) may not be compelled to testify at their commitment extension hearings, equal protection principles required the same protection for SVPs.

The Court of Appeal ultimately affirmed the trial court's finding that the People had not satisfied their burden — under the strict scrutiny standard that applies when the liberty interests of similarly situated classes are treated differently — of demonstrating that compelled SVP testimony was more necessary than compelled NGI testimony to justify the differential treatment. The court ordered new commitment trials for both Field and Asher. The holding reflects the broader principle that SVPs and NGIs are similarly situated with respect to the liberty interests at stake in commitment proceedings, and that significant procedural disparities between the two groups require compelling justification.

> *"The appellate court held that the People had not demonstrated that the testimony of SVPs was more necessary than that of NGIs to justify the disparate treatment under the strict scrutiny standard. The court emphasized that there were sufficient records and other means to evaluate SVPs without compelling their testimony."*
> *— People v. Field (2024) 106 Cal.App.5th 132.*

Defense Note: Trial preparation in an SVPA case is as demanding as trial preparation in a complex felony prosecution. Counsel must master the psychological and actuarial methodology underlying the state's case, retain and prepare a qualified independent expert, develop effective cross-examination of state evaluators, and present mitigating evidence regarding the client's history, treatment progress, and protective factors. This requires time, resources, and genuine expertise in forensic psychology. Cases should never go to trial without independent expert consultation.

Stage 5: Annual Review and Petition for Conditional Release

Following commitment, DSH must conduct an annual examination under WIC section 6604.9 to determine whether the individual continues to meet the definition of a sexually violent predator. If DSH determines that the individual's condition has changed or that conditional release is in the individual's best interest with adequate community protections, DSH may authorize the individual to petition the court for conditional release or unconditional discharge.

Additionally, under WIC section 6608, the committed individual may independently petition the court for conditional release or unconditional discharge without waiting for DSH authorization. Upon receiving such a petition, the court must hold a show cause hearing. If the court determines there is merit to the petition, a full hearing is held at which the individual bears the burden of proof by a preponderance of the evidence that they no longer meet SVP criteria.

Defense Note: Annual review evaluations should be reviewed by counsel every year. A DSH annual evaluation applying a flawed methodology or omitting relevant clinical information — including treatment progress and protective factor changes — is a potential basis for challenging the client's continued confinement. Counsel who lose contact with a committed client after trial are failing their client at a stage that matters.

Stage 6: Show Cause Hearing (§ 6605)

If the annual report indicates the committed person's mental disorder has changed such that he or she no longer meets SVP criteria, the court must hold a hearing on the person's continued commitment. The committed person may also file a petition for conditional release after one year of commitment. At the show cause hearing, the court determines whether there is probable cause to believe the person's condition has changed sufficiently to warrant further proceedings on release. The committed person is entitled to counsel and, if indigent, to appointed counsel at this stage.

Stage 7: Conditional Release — CONREP and Liberty Healthcare

Conditional release is administered through one of two programs: the Forensic Conditional Release Program (CONREP), administered by the state, or Liberty Healthcare, a contracted provider. Under conditional release, the individual lives in the community subject to stringent supervision conditions, which typically include GPS monitoring, residence restrictions, treatment requirements, polygraph testing, and prohibitions on contact with potential victims.

If the individual successfully complies with the conditions of release for a period sufficient to demonstrate that the risk of reoffense has been reduced to an acceptable level, they may petition for unconditional discharge under WIC section 6608. Upon unconditional discharge, the individual is no longer subject to SVP commitment, though they may remain subject to standard sex offender registration and supervision requirements.

Defense Note: The SVP commitment is not permanent, and the law provides meaningful pathways toward community reintegration for individuals who have genuinely addressed the conditions that led to their commitment. Counsel assisting clients in seeking conditional release or unconditional discharge must understand the CONREP and Liberty Healthcare programs, the conditions typically imposed, and the

legal standards governing the court's decision. These petition proceedings require independent expert support and careful preparation.

Stage 8: **Unconditional Discharge (§ 6610)**

An unconditional discharge may be ordered if the court determines the person is no longer an SVP and that the interests of justice require discharge. Following an unconditional discharge, the person is no longer subject to SVP commitment, though sex offender registration obligations under Penal Code section 290 and other statutory consequences of the prior conviction and SVP designation continue to apply. Unconditional discharge terminates the treatment and supervision obligations of conditional release.

H. Constitutional Framework

The SVPA has been challenged on numerous constitutional grounds since its enactment. The Field court noted that Field raised five federal constitutional challenges at trial, arguing that the SVPA violated the equal protection, double jeopardy, due process, and ex post facto clauses of the federal Constitution. These challenges follow a long line of constitutional litigation that has shaped the Act's current form. The settled constitutional framework is as follows.

→ **Double Jeopardy**

The Double Jeopardy Clause bars successive criminal punishments for the same offense. Because SVP commitment is civil, not criminal — and is remedial rather than punitive in purpose and effect — courts have consistently rejected double jeopardy challenges to the SVPA. The United States Supreme Court resolved this question at the federal level in *Kansas v. Hendricks* (1997) 521 U.S. 346, holding that civil commitment of sexually dangerous persons following prison terms does not violate double jeopardy because it serves a legitimate non-punitive purpose and is not so punitive in effect as to negate that purpose.

→ **Ex Post Facto**

For the same reasons — civil, remedial, nonpunitive purpose — courts have rejected ex post facto challenges to the SVPA, including challenges to Proposition 83's amendment of the commitment term from fixed two-year to indefinite. The ex post facto clause applies only to penal laws, and the SVPA's commitment scheme has been held to fall outside that category.

→ **Substantive Due Process**

Civil commitment implicates a fundamental liberty interest protected by the Due Process Clause. To satisfy substantive due process, civil commitment must be coupled with adequate treatment and must be based on a finding of both mental disorder and dangerousness. The SVPA satisfies this standard by requiring a diagnosed mental disorder that makes the person likely to engage in sexually violent criminal behavior and by mandating treatment through DSH. However, due process also imposes limits: as the Supreme Court held in *Kansas v. Crane* (2002) 534 U.S. 407, there must be proof of serious difficulty in controlling behavior — not merely a propensity to reoffend — to comport with the constitutional minimum for civil commitment of sexual predators.

→ **Equal Protection**

Equal protection challenges to the SVPA have produced the most extensive and ongoing constitutional litigation. The California Supreme Court in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*) held that SVPs are similarly situated to NGIs and MDOs (mentally disordered offenders) for equal protection purposes, and that differences in statutory treatment between these similarly situated groups must be scrutinized under the strict scrutiny standard when a fundamental liberty interest is at stake. On remand, *People v. McKee* (2012) 207 Cal.App.4th 1325 (*McKee II*) found that the People had demonstrated the SVPA's differential treatment of SVPs was justified by the greater recidivism risk they pose.

People v. Field (2024) 106 Cal.App.5th 132 continues this line of authority by applying the *McKee* framework to the specific question of compelled testimony. Field and Asher argued — successfully before the trial court on remand — that the People could not demonstrate a compelling interest in compelling SVP testimony that was not equally present for NGI testimony. The Court of Appeal affirmed that ruling. The result is that compelling an SVP to testify at a commitment trial violates equal protection where the People cannot satisfy strict scrutiny, and new trials are the remedy.

> *"[The SVPA] was not designed to be punitive... SVP actions are special civil proceedings." "The SVPA imposes an indeterminate commitment from which the [defendant] can be released if he proves by a preponderance of the evidence that he no longer is an SVP."*
> *— People v. Field (2024) 106 Cal.App.5th 132, citing People v. McKee (2010) 47 Cal.4th 1172.*

I. Treatment Obligations and the Right to Treatment

The SVPA's constitutionality rests in significant part on the treatment component of SVP commitment. Section 6606 requires DSH to provide committed persons with

programming that affords treatment for their diagnosed mental disorder. Treatment is the mechanism by which commitment remains therapeutic rather than punitive, and by which the committed person has the opportunity to demonstrate — through behavioral change documented in the treatment record — that they no longer meet the SVP criteria.

The treatment obligation runs not just to the individual SVP but to the constitutional validity of the commitment scheme as a whole. Courts have recognized that denial of meaningful treatment — or commitment in conditions that are more restrictive than necessary for therapeutic purposes — can raise constitutional concerns and, in extreme cases, can transform an otherwise valid civil commitment into an unconstitutional detention. An attorney representing an SVP must therefore monitor not just the legal proceedings but the adequacy of the treatment the client is receiving, and must be prepared to advocate for meaningful treatment access through the channels available within DSH and, if necessary, through the courts.

Persons who decline treatment offered by DSH must be offered the opportunity to participate in treatment on at least a monthly basis. (§ 6606, subd. (b).) Amenability to treatment is not a prerequisite for a finding that a person meets SVP criteria, nor is it required for an initial commitment order.

J. Key Holdings of People v. Field (2024) 106 Cal.App.5th 132

People v. Field is significant for several reasons beyond its comprehensive statutory overview. The following holdings from the case are directly relevant to SVP defense practice:

Key Holdings — *People v. Field* (2024) 106 Cal.App.5th 132

1. Equal Protection — Compelled Testimony: SVPs are similarly situated to NGIs for purposes of the right not to be compelled to testify at commitment proceedings. The People must demonstrate under strict scrutiny that compelling SVP testimony serves a compelling state interest not equally present in NGI proceedings. Where the People cannot make that showing, compelling the SVP to testify violates equal protection, and new trial is the remedy.
2. Strict Scrutiny Standard Confirmed: The court reaffirmed that because SVP commitment involves a fundamental liberty interest and treats SVPs differently from similarly situated NGIs, equal protection analysis applies strict

scrutiny — not rational basis. The People bear the burden of demonstrating that differential treatment is necessary to serve a compelling interest.

3. Sufficiency of the Record Without Compelled Testimony: The court found persuasive the trial court's finding that there are sufficient records and other means to evaluate SVPs without compelling their testimony. This finding undermines any general justification for the practice of calling SVPs as hostile witnesses in the People's case-in-chief.
4. Constitutional Challenges to the SVPA — General Framework: The court reaffirmed existing precedent rejecting double jeopardy, ex post facto, due process, and general equal protection challenges to the SVPA's structure, consistent with *Kansas v. Hendricks, Kansas v. Crane*, and the *McKee* line of cases.
5. Jury Instruction on 'Likely': The court addressed the propriety of jury instructions on the meaning of 'likely to engage in sexually violent predatory criminal behavior,' confirming that precise instruction on this definitional element is required. Attorneys must ensure juries are correctly instructed on this standard.

K. Why Competent Representation Matters: The Gravity of SVPA Proceedings

The sections above describe the law and the process. This section explains why an attorney who accepts an SVPA case must approach it with the full commitment that indefinite civil detention demands — and what is at stake when they do not.

1. Indefinite Commitment Is the Functional Equivalent of a Life Sentence

An SVP commitment in California is indeterminate. There is no fixed term, no guaranteed release date, and no parole board that will automatically review the case after a set number of years. Once committed, an individual may spend the remainder of their life at Coalinga State Hospital unless they successfully navigate the legal and clinical pathways to conditional or unconditional release — pathways that are narrow, demanding, and heavily contested by DSH.

The comparison to a life sentence is not rhetorical. Statistics from the California Department of State Hospitals confirm that individuals committed under the SVPA

routinely spend many years — in some cases, decades — at Coalinga State Hospital before achieving any form of release. Some die there. The United States Supreme Court acknowledged the gravity of this consequence in *Hendricks*, and California courts have repeatedly recognized that the SVPA's procedural protections — the right to counsel, to a jury trial, to independent experts, and to proof beyond a reasonable doubt — exist precisely because the stakes are so high.

An attorney who approaches an SVPA case with less preparation, less rigor, or less commitment than they would bring to a murder trial is failing their client in a fundamental way. The decision made at the Probable Cause Hearing, at trial, or at any of the post-commitment stages is not an abstract legal exercise. It is a decision that will shape the entire remaining arc of another person's life.

2. The SVPA Is Not a Single Proceeding — It Is a Continuing Legal Relationship

One of the most significant misconceptions attorneys new to SVPA practice bring to these cases is that the matter will be resolved at trial, after which their work is done. This is incorrect. The SVPA is not a single proceeding — it is a multi-stage, ongoing legal relationship between the state and the committed individual that continues for as long as the commitment lasts. Competent representation is required not just at the PCH and at trial, but at every stage of the process described above.

Pre-Petition Stage. If counsel is appointed or retained early enough, there may be an opportunity to challenge the adequacy of the initial DSH evaluations before a petition is ever filed. Understanding the regulatory requirements governing those evaluations — specifically, California Code of Regulations Title 9, sections 4011 through 4014, and the DSH Clinical Evaluator Handbook — is essential groundwork that most attorneys never do.

The Probable Cause Hearing. As addressed in Section 3 of this handbook, the PCH is a genuine adversarial proceeding at which the state must present evidence sufficient to establish probable cause as to all four commitment criteria. An attorney who treats the PCH as a formality, or who advises their client that "the court will always find probable cause," is potentially denying their client a hearing at which the entire petition could be dismissed.

Pretrial Motions. SVPA cases generate substantial pretrial motion practice, including *Ghilotti* Motions challenging the legal sufficiency of evaluations (Section 2), motions to exclude inadmissible hearsay, discovery motions to compel production of all evaluations and underlying data, and motions challenging specific aspects of evaluator methodology or qualifications.

The Commitment Trial. Trial preparation requires mastery of forensic psychology methodology, retained independent expert support, and effective cross-examination of state evaluators — not a cursory review of the police report and a stipulated facts submission.

Annual Reviews. DSH annual evaluations must be reviewed by counsel every year. An evaluator who applies a flawed methodology or omits clinical information that would support the client's release has produced a document that may be challenged.

Conditional and Unconditional Release Petitions. Securing release requires sustained legal advocacy, independent expert support, and thorough knowledge of the WIC section 6608 standards and procedures. This is not work that can be done competently without the same preparation required at the commitment stage.

3. The Danger of Treating SVPA Cases as "Just" Civil Commitment

Some attorneys approach SVPA cases with the assumption that because the proceedings are technically civil rather than criminal, the stakes are somehow lower or the standards of advocacy are relaxed. This assumption is wrong in every respect. The United States Supreme Court in *Hendricks* upheld the civil characterization of SVP commitment laws in part to avoid the constitutional consequences of calling them criminal — but the Court did not suggest that the deprivation of liberty involved was somehow less serious than a criminal sentence.

When an attorney walks into a Probable Cause Hearing without having reviewed the evaluations, without understanding the legal standards that govern each criterion, and without being prepared to cross-examine the state's evaluators, they are not saving time. They are surrendering their client's liberty without a fight at one of the earliest and most consequential stages of a proceeding that could last the rest of that client's life.

4. Professional and Ethical Obligations

The standard for effective assistance of counsel in SVPA proceedings derives from *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that counsel's performance not fall below an objective standard of reasonableness, and that any deficiency be sufficiently prejudicial to undermine confidence in the outcome. Under the stronger *United States v. Cronic*, 466 U.S. 648 (1984) framework, prejudice may be presumed where counsel entirely fails to subject the state's case to meaningful adversarial testing — a standard directly implicated when an attorney does nothing at the PCH or presents no meaningful defense at trial.

Beyond the constitutional standard, California's Rules of Professional Conduct require competent representation in every matter an attorney undertakes. Competence in an SVPA case means more than showing up. It means understanding the law, the science, and the procedure sufficiently to actually test the state's case. An attorney who accepts an SVPA appointment or retention without making a genuine effort to develop that competence is at risk of providing constitutionally deficient representation — and their client bears the consequences.

5. A Commitment to Learning This Law Is a Commitment to Your Client

The SVPA is a specialized and complex area of law. No attorney should expect to master it overnight, and this handbook is designed to provide a foundation, not a complete education. What every attorney handling an SVPA case must commit to is the ongoing effort to understand the law, the science, and the procedure at whatever stage their client's case is in — and to approach each stage with the adversarial engagement it demands.

The individuals subject to the SVPA have already completed their criminal sentences. They are not being held because a jury found them guilty of a new crime. They are being held because the state has determined, through a civil process, that their mental condition makes them too dangerous to release. That determination deserves to be tested rigorously, at every stage, by counsel who understands what is at stake and is prepared to fight for their client's liberty. This handbook exists to help attorneys do exactly that.

L. Summary

The SVPA is a civil commitment scheme of extraordinary consequence. It was upheld as constitutional by the United States Supreme Court in *Hendricks* subject to the requirement, refined in *Crane*, that commitment be linked to a finding of serious difficulty controlling dangerous behavior — not merely a history of past offenses. California's Supreme Court has further defined the contours of the law through decisions including *Hubbart*, *Ghilotti*, *Marentez*, and *Torres*.

The law requires proof of four distinct criteria beyond a reasonable doubt: a qualifying conviction, a currently diagnosed mental disorder, volitional impairment, and a serious and well-founded risk of future sexually violent predatory conduct. The process moves from pre-release evaluation through a petition and initial court review, a Probable Cause Hearing, and ultimately a commitment trial, with post-commitment pathways to

conditional and unconditional release — each stage requiring genuine adversarial engagement.

At every stage, meaningful legal representation is not only the client's constitutional right — it is the critical variable that determines whether the process functions as intended or becomes a conveyor belt to indefinite civil detention. The sections that follow address each stage in detail, with particular emphasis on the areas where effective advocacy is most likely to make a difference.

Section 2: People v. Superior Court (Ghilotti) — Material Legal Error Review follows.

SECTION 2: PEOPLE v. SUPERIOR COURT (*Ghilotti*)

(2002) 27 Cal.4th 888

MATERIAL LEGAL ERROR REVIEW OF SVP EVALUATIONS

A. Introduction: Why You Must Review Every Evaluation for Material Legal Errors

Before an attorney can effectively represent a client at a Probable Cause Hearing, at trial, or at any post-commitment proceeding under the Sexually Violent Predator Act (SVPA), there is one step that is non-negotiable and that cannot be deferred: a thorough, line-by-line review of every psychological evaluation submitted in support of the commitment petition, measured against the legal standards that govern those evaluations. This section explains how to conduct that review and why it is so important.

The central principle of this section comes directly from the California Supreme Court in *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888: an SVP evaluator's professional conclusions are not automatically entitled to legal validity. A court reviewing an SVPA commitment proceeding has the authority — and in appropriate cases the duty — to examine the evaluators' reports for material legal error. Where such error is found, the evaluation is legally deficient and cannot provide a valid basis for commitment proceedings to go forward without correction.

What does this mean for defense counsel? It means that SVP evaluations must be treated like any other piece of legal evidence: they must be examined critically, tested against the applicable legal standards, and challenged when they do not comply with those standards. An attorney who accepts an evaluation at face value, who does not read it carefully, or who lacks the legal knowledge necessary to identify what is and is not permissible in an SVP evaluation, is leaving the most powerful pre-trial tool in their arsenal completely unused.

The blunt truth is this: the vast majority of SVP evaluations contain material legal errors. Experience with these cases reveals that nine out of ten evaluations will have errors significant enough to challenge — errors in the diagnostic process, errors in the evidence relied upon, errors in methodology, errors in the application of legal standards, and errors that are prohibited outright by statute, regulation, or case law. These errors

are not subtle or difficult to find once an attorney knows what to look for. But they require preparation, legal knowledge, and the willingness to engage critically with clinical material.

The categories of material legal error that most commonly appear in SVP evaluations include, but are not limited to:

(1) Misunderstanding or misapplying the statutory criteria established in Welfare and Institutions Code sections 6600 through 6602, including the meaning of 'likely,' the requirement of a current diagnosed mental disorder, the volitional impairment requirement under *Kansas v. Crane* (2002) 534 U.S. 407, and the predatory finding requirement;

(2) Misapplying diagnostic criteria from the DSM-5-TR, including use of diagnosis codes that lack clinical support, reliance on outdated editions of the DSM, or application of diagnostic criteria to facts that do not meet the clinical threshold for the diagnosis;

(3) Reliance on evidence prohibited by law, including dismissed charges, uncharged allegations, or acts for which the subject was acquitted — evidence that carries no legal weight and whose use in an SVP evaluation can render the evaluation legally deficient;

(4) Failure to follow the legally mandated procedures set out in California Code of Regulations Title 9, Sections 4010 through 4014, including failure to use an approved assessment protocol, failure to document the basis for actuarial scoring decisions, and failure to address the required factors for each statutory criterion;

(5) Speculation prohibited by case law, including opinions that rest on analytical gaps too wide to bridge between the clinical data and the conclusion reached, as addressed in *People v. Wright* (2016) 3 Cal.App.5th 198, and impermissible reliance on unverified assumptions about victim characteristics as the basis for a diagnosis.

Each of these categories is discussed in detail below, together with the case law and statutory authority that defines the legal boundary and gives defense counsel the tools to challenge evaluations that cross it.

An example of a formal pleading challenging an evaluation on *Ghilotti* grounds — commonly referred to as a '*Ghilotti* Motion' — appears as Appendix A to this handbook. Counsel is encouraged to review Appendix A in conjunction with this section to understand how the legal principles discussed here translate into a formal court filing. A *Ghilotti* Motion should be filed before the Probable Cause Hearing whenever an evaluation contains material legal error, and it should be supported by specific identification of the error, the applicable legal standard that was violated, and the relief requested.

B. People v. Superior Court (Ghilotti)

(2002) 27 Cal.4th 888

The Foundational Case for Judicial Review of SVP Evaluations

People v. Superior Court (*Ghilotti*) (2002) 27 Cal.4th 888 is the bedrock authority for every challenge to a legally defective SVP evaluation. It establishes that SVP evaluators are not infallible authorities whose conclusions courts must accept, and that an evaluation infected by material legal error cannot stand as a valid basis for commitment. Every attorney handling an SVPA case must understand *Ghilotti* thoroughly.

Facts and Procedural Background

Patrick Henry Ghilotti had been twice convicted of forcible oral copulation in 1979 and 1985, involving multiple victims, and had previously been committed as an SVP under the SVPA. When his initial two-year commitment neared expiration, two mental health professionals designated by the Director of the Department of Mental Health (DMH) were assigned to evaluate Ghilotti for recommitment. Both evaluators concluded that Ghilotti did not meet the statutory criteria for recommitment. A third independent evaluator reached the same conclusion.

Despite the negative evaluations, the DMH Director — who disagreed with the evaluators' conclusions and believed, based on input from the hospital's treating staff, that Ghilotti remained dangerous — directed the Marin County District Attorney to file a recommitment petition. The DA did so, relying not on the evaluators' conclusions but on the Director's independent assessment. The superior court dismissed the petition, holding that the Director could not override or disregard the designated evaluators' recommendations. The People sought mandamus review.

The California Supreme Court granted review not only to resolve the narrow question the lower courts had addressed, but to consider broader issues about the legal requirements for SVP evaluations and when courts may review those evaluations for legal sufficiency.

Primary Holdings

First: An SVPA commitment petition cannot be filed unless two mental health professionals designated by the Director under statutory procedures have agreed, by correct application of the statutory standards, that the person 'has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody.' (WIC § 6601, subd. (d).) The Director cannot

bypass this requirement by relying solely on his own independent determination, the opinions of treating staff, or other evidence not constituting a proper designated evaluation. The concurrence of two properly designated evaluators, applying the correct legal standards, is a statutory prerequisite to filing.

Second: The word 'likely' in the SVPA does not mean 'more likely than not,' i.e., more than a 50 percent probability of reoffense. Instead, the correct standard is whether the person 'presents a substantial danger — that is, a serious and well-founded risk' of committing sexually violent acts if free in the community. An evaluator who applies the 'more likely than not' standard and recommends against commitment solely because the evaluator cannot conclude reoffense is more probable than not has applied the statute incorrectly. Equally, the standard does not collapse into a mere possibility; a remote chance of reoffense is insufficient. The evaluator must assess whether the risk is substantial and well-founded.

Third: Courts have the authority — and in appropriate circumstances the obligation — to review designated evaluators' reports for material legal error. If an evaluator has applied an incorrect legal standard, has misunderstood the statutory criteria, or has otherwise committed a material legal error that infected the evaluator's conclusion, the evaluation is legally deficient. It cannot provide the required concurrence for filing a petition, and a petition based on it must be challenged accordingly.

Fourth: To constitute material legal error, the error must have 'affected the evaluator's conclusion.' Not every mistake or methodological weakness in an evaluation rises to the level of material legal error. Counsel must be prepared to show that the specific legal error they identify actually infected the evaluator's ultimate conclusion — that the person meets or does not meet the SVP criteria. An error that is technical but inconsequential to the evaluator's opinion will not automatically entitle the subject to a new evaluation or PCH.

Additional Findings of Strategic Importance

The *Ghilotti* court also addressed several additional issues of significant practical importance to defense counsel:

The court clarified that evaluators must address voluntary treatment alternatives as part of the 'appropriate treatment and custody' prong of the statutory standard. An evaluator who focuses exclusively on the risk of reoffense without considering whether supervised outpatient treatment or conditional release with conditions could adequately manage the person's risk has not completed the analysis the statute requires. This omission is itself a basis for challenge.

The court confirmed that SVPA proceedings, though civil in nature, involve such significant deprivations of liberty that courts must take a substantive, engaged role in ensuring that legal prerequisites for commitment are met. *Ghilotti* authorizes judicial

scrutiny of the evaluative process, not mere rubber-stamping of the evaluator's professional judgment.

The court made clear that a party may challenge the legal sufficiency of an evaluation at multiple stages of the proceedings — before a Probable Cause Hearing, at trial, and in post-commitment review. Defense counsel should not wait for trial to raise *Ghilotti* claims that are identifiable from the face of the evaluation at an earlier stage.

C. Wright v. Superior Court (2012)

204 Cal.App.4th 879

<u>*Ghilotti* Applies to Pre-Hearing Challenges; Non-Concurring Evaluators Require Full Compliance Before Petition Can Proceed</u>

Wright v. Superior Court (2012) 204 Cal.App.4th 879 arose directly from the fallout of In re *Ronje* (2009) 179 Cal.App.4th 509, which held that the 2007 DMH assessment protocol — used to conduct SVP evaluations for years — was an invalid underground regulation that had never been properly adopted through the Administrative Procedure Act. *Ronje* required that any individual evaluated under the invalid protocol be given new evaluations conducted under a valid protocol, followed by a new Probable Cause Hearing based on those new evaluations.

In *Wright*, after the *Ronje* remedy was ordered and new evaluations were conducted, the two initial post-*Ronje* evaluators disagreed: one found that *Wright* met the SVP criteria and one did not. *Wright* filed a plea in abatement seeking dismissal of the SVPA commitment petition on the ground that there was no concurrence of evaluators, a statutory prerequisite under section 6601, subdivision (d).

<u>Primary Holdings</u>

First: *Ghilotti* expressly authorizes the use of nonstatutory pleadings — including a plea in abatement — to challenge an SVPA commitment proceeding before the Probable Cause Hearing on the ground that the required statutory prerequisites, including concurring evaluations, have not been satisfied. Defense counsel need not wait for trial to raise these challenges. A *Ghilotti*-based pleading filed before the PCH, attacking the legal sufficiency of the evaluations, is a proper procedural vehicle.

Second: The SVPA permits a commitment petition to proceed if both initial evaluators concur, or — if the initial evaluators disagree — if both subsequently appointed independent evaluators concur. (WIC § 6601, subds. (d), (e), (f), (i).) A split among initial evaluators does not automatically require dismissal; it triggers the obligation to

appoint two additional independent evaluators. Only if the independent evaluators also fail to concur does the petition lose its evaluative basis.

Third: A pre-PCH nonstatutory pleading challenging compliance with evaluator concurrence requirements must be denied if the full statutory process has not yet been completed — i.e., if independent evaluators have been appointed but their reports are not yet before the court. Premature filing does not entitle the petitioner to immediate dismissal, but preserves the issue for renewal once the process is complete.

Strategic Significance for Defense Counsel

Wright is critical for defense counsel because it confirms that *Ghilotti* grounds can and should be raised before the Probable Cause Hearing. The earlier the challenge is made — assuming the legal defect is identifiable from the face of the evaluation — the more effective it is. A successful pre-PCH *Ghilotti* challenge can result in the court ordering new evaluations, which may produce a different outcome. In the best case, new evaluators conclude that the person does not meet SVP criteria, eliminating the foundation for the petition entirely.

Wright also reinforces that attention to the evaluator concurrence requirements of section 6601 is a distinct and separately enforceable basis for challenge, independent of substantive legal errors within a given evaluation. An attorney should check not only what the evaluators said but whether the proper process for obtaining those evaluations was followed, whether the correct individuals were designated, and whether any split in opinion was resolved through the statutorily required procedure.

D. Reilly v. Superior Court (2013)

57 Cal.4th 641

Material Error Must Be Shown; Invalid Protocol Alone Does Not Require Dismissal

Reilly v. Superior Court (2013) 57 Cal.4th 641 is the California Supreme Court's refinement of the remedy available when an SVP evaluation is conducted under a legally invalid assessment protocol. The case arose from the same *Ronje* line of cases as *Wright*. After *Ronje*, Kevin Reilly received new evaluations under the valid 2009 protocol. Both post-*Ronje* evaluators concluded he no longer met SVP criteria. Before a new PCH could be held, Reilly filed a plea in abatement seeking dismissal of the petition on the ground that the SVPA requires two concurring evaluations to support a petition filing, and that the post-*Ronje* evaluations did not provide that concurrence. The Court of Appeal agreed and ordered dismissal. The Supreme Court reversed.

Primary Holdings

First: The use of an invalid assessment protocol in conducting SVP evaluations does not automatically require dismissal of the SVPA commitment petition. Courts are not required to dismiss commitment proceedings simply because the OAL has determined that the protocol under which the evaluations were conducted was an invalid underground regulation.

Second: To obtain relief based on the use of an invalid assessment protocol, the alleged SVP must show that any fault in the protocol created a material error — specifically, that the error 'reasonably might have affected the outcome' of the evaluation in the particular case. This is the same materiality standard that *Ghilotti* applies to other forms of evaluator error. Not every procedural defect in the evaluation process entitles the subject to automatic relief.

Third: The California Supreme Court expressly disapproved of In re *Ronje* to the extent *Ronje* omitted the materiality requirement and suggested that pre-hearing procedural errors in evaluation protocols automatically entitle subjects to new evaluations and PCHs without a showing of actual impact. Reilly makes clear that *Ghilotti*'s materiality standard applies uniformly across all challenges to SVP evaluations, whether the alleged error is a substantive legal error in the evaluator's analysis or a procedural defect in the protocol used to conduct the evaluation.

Fourth: Because SVPA proceedings must be based on 'current' mental disorders, evaluations that become stale over time may need to be updated. The court confirmed that the SVPA anticipates ongoing evaluation and that updated or replacement evaluations are a regular part of the process, not an extraordinary remedy.

What *Reilly* Means for *Ghilotti* Motions

Reilly does not weaken the *Ghilotti* doctrine — it sharpens it. An attorney filing a *Ghilotti* Motion cannot simply point to a procedural defect in the evaluation process and demand dismissal or new evaluations. The motion must demonstrate that the specific legal error identified had an actual impact on the evaluator's conclusion. This requires counsel to engage with the substance of the evaluation itself: what conclusion did the evaluator reach? What was the basis for that conclusion? If the prohibited or legally erroneous basis were removed, could the evaluator's conclusion still stand on the remaining evidence?

When the answer to that last question is 'no' — when the evaluation's conclusion depends on prohibited evidence, an incorrect legal standard, or speculative reasoning that the law does not permit — the materiality requirement is satisfied, and the *Ghilotti* Motion should succeed. Counsel who prepares this analysis rigorously and presents it clearly will put the court in a position where it has no principled basis for refusing relief.

E. Griffin v. United States (1991)

502 U.S. 46

Legal Invalidity vs. Evidentiary Insufficiency: A Critical Distinction for *Ghilotti* Challenges

Griffin v. United States (1991) 502 U.S. 46, decided by the United States Supreme Court, is not an SVPA case — it is a federal criminal case addressing when a general verdict must be set aside. But its analytical framework is directly relevant to *Ghilotti* Motion practice and should be part of every defense attorney's toolkit when challenging SVP evaluations that rest on multiple grounds, some legally valid and some not.

Facts and Holding

Diane Griffin was charged in a multiple-object conspiracy to defraud federal agencies — the IRS and the DEA. Evidence at trial implicated her in the IRS object but was inadequate as to the DEA object. The trial court instructed the jury that it could convict on either theory, and the jury returned a general verdict of guilty. Griffin argued on appeal that the general verdict could not stand because the evidence was insufficient to support one of the two theories underlying it.

The Supreme Court held that a general guilty verdict in a federal prosecution does not need to be set aside merely because the evidence is inadequate to support one of the possible bases of conviction, provided that at least one legally valid and factually supported basis exists. The Court drew a critical distinction between legal invalidity (as in *Yates v. United States*, 354 U.S. 298) and evidentiary insufficiency. Jurors, the Court reasoned, are generally capable of assessing whether a theory is supported by the facts — but are not generally equipped to determine whether a particular theory is contrary to law.

Application to *Ghilotti* Challenges

The analytical framework of *Griffin* maps directly onto the distinction *Ghilotti* draws between material legal error and mere factual disagreement with the evaluator's conclusions. Under *Ghilotti*, a court reviewing an SVP evaluation has the authority to correct an evaluator's legal error, but cannot simply substitute a different professional judgment for the evaluator's clinical conclusion when no legal error has occurred.

Griffin clarifies why this distinction matters: when an evaluation rests on multiple grounds — some legally valid and some tainted by material legal error — the question is whether the legally tainted ground infected the conclusion. If the prohibited ground was so central to the evaluator's reasoning that removing it would leave the conclusion without sufficient support, the entire evaluation is compromised and cannot stand — analogous to the *Yates* situation where one of the bases for conviction was legally

invalid. But if the legally problematic ground was merely supplementary and the conclusion would stand on the legally permissible grounds alone, the *Griffin* analysis suggests the error may not be material.

This framework helps defense counsel construct and focus *Ghilotti* Motions effectively. The motion must demonstrate not merely that the evaluator relied on something legally improper, but that this improper reliance was actually necessary to the evaluator's conclusion — i.e., that without the prohibited ground, the conclusion would not have been reached. When that showing can be made, the motion is on its strongest footing.

Griffin also underscores, from the opposite direction, why the People cannot freely cure a defective evaluation by pointing to other, legally permissible evidence the evaluator also considered. If the evaluation is structured such that the legal error is woven through the analysis — if, for example, the entire diagnosis rests on data that includes uncharged, dismissed, or legally prohibited allegations — then the legally permissible portions of the record cannot independently salvage the conclusion.

F. Five Categories of Material Legal Error in SVP Evaluations

Drawing on *Ghilotti*, *Wright*, *Reilly*, *Griffin*, the SVPA, and the California Code of Regulations Title 9, Sections 4010-4014, the following five categories represent the most common and most significant forms of material legal error appearing in SVP evaluations. Each is separately actionable through a *Ghilotti* Motion. In many cases, a single evaluation will contain errors from multiple categories simultaneously, which strengthens the motion and makes dismissal or new evaluations more likely.

1. Misunderstanding or Misapplying Statutory Requirements (WIC §§ 6600-6602)

The most fundamental category of material legal error is a misunderstanding or misapplication of the statutory criteria for SVP status. Welfare and Institutions Code sections 6600, 6601, and 6602 establish the legal standards that evaluators must apply. When an evaluator departs from those standards — applying the wrong definition of 'likely,' failing to assess volitional impairment as required by *Kansas v. Crane* (2002) 534 U.S. 407, failing to make a predatory finding as required by WIC § 6600, subdivision (e), or failing to assess voluntary treatment alternatives — the evaluation is legally deficient.

Common statutory errors include: applying a 'more likely than not' standard for the likelihood of reoffense, in direct violation of *Ghilotti*; treating the prior conviction alone as sufficient to establish the mental disorder, in violation of WIC § 6600, subd. (a)(3)'s express admonition that prior conviction cannot be the sole basis for the SVP finding;

failing to establish that the diagnosed mental disorder predisposes the person to criminal sexual acts, as opposed to merely diagnosing a disorder in the abstract; and failing to make an independent predatory finding supported by clinical analysis of the person's likely future behavior, rather than simply noting that prior offenses involved strangers or casual acquaintances.

Counsel should read the evaluation's methodology section and conclusion with the SVPA criteria in hand. Any criterion that the evaluator does not address, addresses incorrectly, or addresses with a wrong definition of the applicable standard is a potential *Ghilotti* ground.

2. Misapplying Diagnostic Criteria (DSM-5-TR Requirements)

An SVP evaluation must include a 'diagnosed mental disorder' that meets the definition in WIC § 6600, subdivision (c): a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts. The diagnosis must be clinically valid and properly applied under the current DSM-5-TR.

Diagnostic errors are among the most common — and most litigable — forms of material legal error in SVP evaluations. These include: diagnosing a mental disorder that is not recognized in the DSM-5-TR; applying diagnostic criteria from a superseded edition of the DSM without clinical justification; diagnosing a disorder such as Pedophilic Disorder without establishing that the victims were actually prepubescent (i.e., assessing whether victims were prepubescent versus pubescent rather than relying on age alone); diagnosing Hebephilia — not a DSM-5-TR diagnosis — without establishing a current scientific consensus supporting its use, as addressed in *People v. Wright* (2016) 3 Cal.App.5th 198; and treating a V Code (a descriptor of a problem that is a focus of clinical attention, not a diagnosable mental disorder) as the equivalent of a mental disorder for SVP purposes, which is expressly prohibited by the DSM-5-TR and the DMH Clinical Evaluator Handbook.

Counsel should obtain the DSM-5-TR and compare the diagnostic criteria for the disorder identified in the evaluation against the facts the evaluator cites in support of the diagnosis. Any gap between the criteria and the cited facts is a potential diagnostic challenge. When the diagnosis is a contested one — Hebephilia, Paraphilic Disorder NOS, or a disorder whose clinical validity is disputed — the challenge is even stronger.

3. Use of Evidence Prohibited by Law

SVP evaluations routinely incorporate documentation of arrests, dismissed charges, uncharged allegations, and acts for which the individual was acquitted. Under California law, this evidence carries no weight as proof that the acts occurred, and its use as the factual predicate for an SVP diagnosis or a risk assessment conclusion constitutes material legal error.

The constitutional prohibition on using acquitted conduct and dismissed charges as the factual basis for a legal determination is well established. In an SVP evaluation, the clinical consequence of this prohibition is significant: if an evaluator's diagnosis of a paraphilic or other qualifying disorder rests in part on alleged acts for which the person was not convicted — particularly where those allegations were dismissed, resulted in acquittal, or were never charged — the diagnosis has an unlawful evidentiary foundation. Removing the prohibited evidence from the factual record may eliminate sufficient support for the diagnosis entirely.

Counsel should carefully compare the list of incidents cited in the evaluation against the client's criminal history. Any incident cited as clinical support for the diagnosis or risk assessment that does not correspond to a conviction is potentially prohibited evidence. Arrests without conviction, prior charges that were dismissed as part of a plea, and uncharged allegations from police reports are particularly suspect. The motion should identify each such incident by date, alleged victim, and disposition, and should argue that the evaluator's reliance on it constitutes material legal error under *Ghilotti*.

4. Failure to Follow Legally Mandated Procedures (CCR Title 9, §§ 4010-4014)

California Code of Regulations Title 9, Sections 4010 through 4014, and the DSH Clinical Evaluator Handbook establish specific procedural requirements for SVP evaluations: the use of an approved standardized assessment protocol (In re *Ronje*, 179 Cal.App.4th 509; *Reilly v. Superior Court*, 57 Cal.4th 641); documentation of the basis for actuarial instrument scoring decisions, including Static-99R and Static-2002R; assessment of dynamic risk factors using approved instruments such as Stable-2007 with appropriate recognition of its limitations for long-term institutionalized populations; and specific consideration of protective factors and voluntary treatment participation as required by *Ghilotti*.

A failure to comply with any of these required procedures can constitute material legal error, provided counsel can show that the failure affected the evaluator's conclusion. The most productive challenges involve failures that go directly to the risk estimate: if the evaluator's Static-99R score was calculated incorrectly, or if dynamic risk factors were improperly scored, or if protective factors were not considered at all, the resulting risk assessment is methodologically unsound and its legal validity is in question.

Counsel should request the complete scoring worksheets and actuarial data underlying the evaluation through discovery. A forensic psychology expert can assess whether the instrument scores were calculated in accordance with the instrument's manual and whether the evaluator's methodology complies with the regulatory requirements. Deviations from required procedure that result in a higher risk score than would result from correct application are particularly powerful *Ghilotti* grounds.

5. Speculation Prohibited by Case Law (*People v. Wright*)

California courts have long recognized that expert opinion testimony must rest on a reliable factual foundation and cannot be so speculative or conjectural as to constitute a mere guess. In the SVP context, *People v. Wright* (2016) 3 Cal.App.5th 198 provides the clearest statement of this principle as applied to diagnosis and commitment proceedings.

In *Wright*, the court reversed an SVP commitment where the sole basis for the diagnosed mental disorder — Hebephilia — was expert testimony that depended on knowing whether the victims were in puberty at the time of the offenses, a fact the expert conceded he could not determine from the available records. The court held that, without reliable evidence establishing the factual predicate for the diagnosis, the opinion was an analytical gap too wide to bridge — impermissible speculation that could not support a commitment finding beyond a reasonable doubt.

The *Wright* principle applies to any aspect of an SVP evaluation that rests on assumptions, inferences, or guesses about facts that are not established in the record. This includes: diagnosing a disorder based on victim characteristics that cannot be independently verified; predicting future predatory behavior based on offense patterns where the evaluator has no reliable information about the circumstances of the offense; and drawing clinical inferences from documents whose accuracy the evaluator has no basis to assess. When an evaluator's conclusion cannot be traced back to reliable, verifiable facts in the record, the opinion is speculative and cannot stand as a legally sufficient basis for commitment.

Counsel should identify every factual assumption that underlies the evaluator's diagnosis and risk assessment and ask whether each assumption is verifiable from the record. Where a critical assumption is unverifiable — where the evaluator simply does not know whether a key fact is true and has assumed it to be — that assumption is the foundation for a *Wright*-based *Ghilotti* challenge.

6. Violations of the DSH Clinical Evaluator Handbook and Standardized Assessment Protocol (November 2008)

The California Department of Mental Health (now the Department of State Hospitals) published its Clinical Evaluator Handbook and Standardized Assessment Protocol in November 2008 ("the Handbook"). The Handbook is the operational document that governs how designated SVP evaluators must conduct their evaluations. It translates the requirements of Welfare and Institutions Code section 6600 et seq. and the applicable California Code of Regulations into concrete, step-by-step procedures that every evaluator is trained on and contractually obligated to follow. When an evaluator deviates from the Handbook's mandatory requirements in a way that affects the evaluator's conclusion, that deviation constitutes a material legal error independently actionable through a *Ghilotti* Motion.

Defense counsel should obtain and study the Handbook in every case. It is, in effect, the evaluator's own rulebook, and every departure from it is a departure the evaluator must explain and justify. The categories of Handbook-based material legal error that most commonly appear in SVP evaluations are set out below, organized by the Handbook's three-criterion structure.

a. Criterion A — Qualifying Conviction Errors

The Handbook instructs evaluators to always cite the source of information regarding the predicate offense and to list each arrest and conviction for relevant Penal Code violations that make the subject eligible under WIC 6600. It further requires that for each qualifying victim the evaluator affirmatively document whether force, violence, duress, menace, or fear of immediate and unlawful bodily injury was involved — and instructs evaluators that a mere summary statement that "force was involved" is insufficient. The evaluator must quote specific facts and behaviors from the record establishing that each element of the qualifying offense is met.

Material legal errors under Criterion A include: (1) treating a conviction that does not fall within the enumerated offenses in WIC 6600(b) as a qualifying sexually violent offense; (2) relying on arrest records, uncharged allegations, or dismissed charges to establish the predicate offense, rather than a conviction; (3) failing to document force, violence, duress, menace, or fear for each qualifying victim as separately required by the statute and the Handbook; (4) improperly counting a prior MDSO determination without verifying that at least one victim is documented; and (5) counting out-of-state convictions without verifying that all elements of a qualifying California offense are present in the foreign conviction. Each of these errors is identifiable on the face of the evaluation and constitutes a flaw in the foundational legal requirement for commitment.

b. Criterion B — Diagnosed Mental Disorder Errors

The Handbook expressly states that V Codes — descriptors in the DSM that represent conditions that may be a focus of clinical attention but are not diagnosable mental disorders — are inappropriate for diagnostic purposes in SVP evaluations. A V Code diagnosis as the sole or primary basis for the mental disorder finding is a facial violation of the Handbook and constitutes material legal error. Any diagnosis offered must fall within a recognized DSM diagnostic category, must be supported by the psychiatric history, mental status examination, psychological testing, and clinical interview findings, and must be specifically tied to the WIC 6600(c) requirement that the disorder predispose the person to the commission of criminal sexual acts.

The Handbook requires that the volitional impairment finding — mandated by *Kansas v. Crane* — be independently established with specific behavioral evidence, not simply assumed from the fact of prior offenses. The Handbook instructs evaluators to consider behaviors such as poor institutional behavior, reoffending after treatment, impulsivity, and reoffending quickly after release as indices of volitional difficulty. An evaluation that

recites prior offenses as self-evident proof of volitional impairment, without identifying specific clinical evidence of serious difficulty controlling behavior, violates this Handbook requirement and the constitutional standard of *Crane*.

The Handbook also requires that a thorough sexual history be conducted to establish the basis for any paraphilic diagnosis, because, as the Handbook notes, the level of deviant sexual preference is linked to the paraphilia diagnosis and contributes to offender risk. The strongest predictor identified in the Hanson and Bussiere meta-analysis incorporated in the Handbook is sexual arousal toward children as measured by phallometric assessment. Where a phallometric assessment (PPG) or validated sexual interest assessment (ABEL/AASI-3) has been conducted and shows no sexual interest in children, the Handbook's own evidentiary framework requires that this finding be disclosed, considered, and addressed in the evaluation. Omission of negative phallometric or sexual interest assessment results that contradict the diagnosis is a direct violation of the Handbook's requirement for balanced factual presentation and constitutes material legal error.

c. Criterion C — Risk Assessment Errors

Criterion C errors are among the most technically complex and clinically significant. The Handbook mandates a specific adjusted actuarial methodology: begin with the Static-99 (now Static-99R in current practice) to establish a base rate, then systematically consider additional static risk factors not captured by the actuarial instrument, then evaluate dynamic risk factors using the Stable-2007 framework, then consider protective factors, and finally formulate a clinical conclusion that accounts for all of the above. Departures from this required sequence or omissions of required elements are violations of the Handbook and, where they affect the risk conclusion, are material legal errors.

Static-99R Scoring Errors: The Handbook requires evaluators to calculate the Static-99 score accurately and to consider that the instrument's base rate estimates span 15 years and represent a floor, not a ceiling, of true risk. Any error in scoring the Static-99R items — for instance, miscounting prior sex offense convictions, misscoring the "any unrelated victims" item, or incorrectly applying the "any male victims" item — produces an inaccurate starting actuarial estimate. Because the entire adjusted actuarial analysis builds on this foundation, a scoring error in the Static-99R can infect the entire risk assessment. Defense counsel should obtain the actuarial scoring worksheet and verify every item against the documented record.

Stable-2007 Misapplication: The Handbook expressly warns that the Stable-2007 was validated on a community sample scored by parole officers evaluating offenders across time, and that this differs fundamentally from inmates confined to a state institution. The Handbook states directly: "for offenders who have been incarcerated continuously over lengthy periods of time the dynamic factors will have less relevance." Despite this explicit caution, evaluators routinely score Stable-2007 items against institutionalized

individuals as though the instrument were fully applicable, and then use elevated scores to justify upward adjustments to the actuarial risk estimate. This misapplication of an instrument the Handbook itself identifies as limited in this context is material legal error. Counsel should specifically challenge any upward risk adjustment that rests on Stable-2007 scores for a long-term institutionalized individual without an independent basis for the adjustment in community behavior evidence.

Failure to Consider Protective Factors: The Handbook expressly requires evaluators to consider protective factors and states that their presence may mitigate the actuarial risk estimate. Three protective factors are specifically enumerated: (1) a significant community sex-offense-free period; (2) advanced age or poor health significantly reducing opportunity, ability, or motivation to reoffend; and (3) successful completion of a cognitive-behavioral sex offender treatment program. The Handbook describes these as balanced counterweights to risk factors and requires that a neutral, fact-finding evaluation address them. An evaluator who catalogues every risk factor in exhaustive detail but omits, ignores, or dismisses protective factors without individualized analysis has not conducted the balanced risk assessment the Handbook mandates, and has produced a one-sided document that cannot qualify as a neutral professional opinion under *Ghilotti*.

Failure to Address Voluntary Treatment Under *Ghilotti* and *Cooley*: The Handbook expressly requires that where the subject proposes a voluntary plan for supervision and treatment in the community, the evaluator must address six specific factors: (1) the availability, effectiveness, safety, and practicality of community treatment for the individual; (2) whether the mental disorder leaves the person likely to pursue and maintain voluntary treatment; (3) intended treatment effectiveness and whether a reasonable expectation exists that the person will pursue it; (4) a history of pursuing and maintaining voluntary treatment; (5) progress in ongoing treatment and expressed intent to seek treatment; and (6) any other indicia bearing on the credibility and sincerity of the expression of intent. An evaluation that fails to address these factors — or that addresses them with a conclusory dismissal rather than individualized analysis — violates the Handbook requirement derived from *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888 and *Cooley v. Superior Court* (2002) 29 Cal.4th 228, and constitutes material legal error.

Circular Volitional Impairment and Risk Reasoning: The Handbook warns against applying a standard of “more likely than not” as defined by *Ghilotti*, and instructs evaluators that the standard is not tied to a percentage but to a judgment, considering all evidence, that there is a substantial danger based on a serious and well-founded risk. A common error is for evaluators to reason circularly: the person committed sex offenses in the past, therefore the mental disorder causes volitional impairment, therefore the person is likely to reoffend — with the offense history serving as both the evidence for the disorder and the evidence for the risk conclusion. This is the exact circular reasoning that *Kansas v. Crane* and *Ghilotti* prohibit. The Handbook’s own

methodology requires each element to be established by independent clinical evidence; when the same set of historical offenses is used to prove the diagnosis, the volitional impairment, and the likelihood of reoffense without any independent clinical support for any of the three conclusions, the evaluation fails the Handbook's standards on every criterion simultaneously.

d. Turner v. Superior Court Compliance — Prior Not-SVP Jury Finding

The Handbook incorporates *Turner v. Superior Court* (2003) 15 Cal.App 4th 1046 as a special mandatory requirement for cases where a jury has previously found the respondent not to be an SVP. In those cases, the Handbook requires the evaluator to: (1) acknowledge the prior jury finding, (2) accept it as true for purposes of the current diagnosis, and (3) explain why post-jury-finding facts are sufficiently different to support a current SVP finding. An evaluation that ignores a prior not-SVP verdict, that does not address the *Turner* requirement at all, or that relies primarily on the same pre-verdict offense history the jury already considered without explaining what new post-verdict information justifies a different conclusion, violates the Handbook and produces an evaluation that is legally deficient on its face. Counsel should affirmatively identify any prior not-SVP verdict and verify whether the evaluation complies with *Turner* before the Probable Cause Hearing.

e. Missing or Deficient Predatory Finding

The Handbook states it is imperative that every evaluation contain a specific statement addressing whether future sexually violent acts will or will not be predatory as defined in WIC 6600(e) — meaning acts directed toward a stranger, a person of casual acquaintance, or an individual whose relationship was established for the primary purpose of victimization. The Handbook further requires that if the finding is that future criminal acts will be predatory, there must be a rationale based on the *Ghilotti* "likely" standard. An evaluation that omits the predatory finding entirely, that rests the predatory finding solely on the fact that prior victims were strangers without a forward-looking clinical analysis of likely future behavior, or that fails to apply the *Ghilotti* standard to the predatory finding specifically, is facially deficient under the Handbook and constitutes material legal error. Counsel should verify that every evaluation contains a distinct, forward-looking predatory finding with supporting clinical rationale — not merely a description of prior offense circumstances.

In summary, the Handbook is not merely a set of administrative guidelines — it is the authoritative legal and procedural framework within which every designated SVP evaluator operates. A systematic comparison of each evaluation against the Handbook's requirements for all three criteria will almost always reveal departures that, individually or in combination, constitute material legal errors under *Ghilotti*. Counsel who conducts this comparison before the Probable Cause Hearing — and who is prepared to present the specific Handbook violations to the court in a well-organized *Ghilotti* Motion — is wielding the most powerful pre-trial tool available in SVPA practice.

G. How to Use a Ghilotti Motion: Practical Guidance

A *Ghilotti* Motion is a formal nonstatutory pleading filed before the Probable Cause Hearing, requesting that the court review the designated SVP evaluations for material legal error. It should be filed as early as possible after counsel has had a sufficient opportunity to review the evaluations, and it should be supported by a legal brief, the relevant portions of the evaluation, and, where available, a declaration from a defense forensic expert addressing the legal errors identified.

The motion should be structured as follows: (1) a statement of the relevant legal standard from *Ghilotti*, including the materiality requirement from Reilly; (2) identification of each specific legal error with citation to the statute, regulation, or case law that the evaluator violated; (3) an explanation of how the error affected the evaluator's conclusion, with specific references to the text of the evaluation; and (4) a statement of the relief requested — which may include new evaluations, dismissal of the petition, or, in appropriate cases, an evidentiary hearing at which the evaluator can be cross-examined regarding the basis for the challenged conclusions.

Not every *Ghilotti* Motion will result in dismissal. The range of available relief includes: new evaluations conducted by different evaluators free of the identified errors; a new Probable Cause Hearing based on compliant evaluations; exclusion of specific portions of a defective evaluation from use at the PCH or trial; and, in the clearest cases of pervasive legal error, dismissal of the petition. The specific relief that is available depends on the nature and severity of the error and whether, after the error is corrected, sufficient evidence remains to support the proceeding.

Even when a *Ghilotti* Motion does not result in immediate dismissal, it serves essential functions: it preserves the legal error for appeal; it educates the court about the weaknesses in the evaluation; it may influence the court's assessment of the evaluation's overall credibility at the PCH; and it creates a documented record of counsel's active, engaged representation — which is relevant both to the client's interests and to any subsequent IAC analysis.

See Appendix A for a sample *Ghilotti* Motion and supporting pleadings.

SECTION 3: THE PROBABLE CAUSE HEARING — PREPARING AND DEFENDING

The Probable Cause Hearing is not a formality. It is one of the most consequential proceedings in an SVPA case — and one of the most consistently mishandled. An attorney who walks into the PCH unprepared, without a defense expert, without a cross-examination strategy, and without a working knowledge of the scientific literature underlying the state's case is not representing a client. They are presiding over a client's continued indefinite detention without a fight.

This section explains what the PCH is, what constitutional and statutory rights attach to it, and what competent representation at this stage actually requires. The sections that follow will address specific areas of expert attack, cross-examination strategy, and the motions that should accompany every PCH defense.

A. The Probable Cause Hearing Is a Critical Stage of the Proceedings

Under Welfare and Institutions Code section 6602(a), once a petition for civil commitment is filed and the court makes an initial determination that the petition is facially sufficient, the individual — who has now completed his criminal sentence — is taken into custody solely on the basis of the civil petition. He is transported to a county jail or secure facility and held pending the PCH, which must commence within ten calendar days.

The California Supreme Court in *Cooley v. Superior Court* (*Marentez*), 29 Cal.4th 228 (2002), held unequivocally that the PCH must encompass all four elements required for commitment at trial. It is not a limited screening for facial sufficiency. It is not a preliminary examination of a single criterion. It is a full adversarial hearing at which the state must present evidence sufficient to establish probable cause as to every element of the SVP criteria: qualifying conviction, diagnosed mental disorder, volitional impairment, and serious and well-founded risk of future sexually violent predatory conduct.

The rules of evidence apply at the PCH. The individual has the right to be represented by counsel. The state must present evidence. Defense counsel must be prepared to challenge that evidence, cross-examine the state's evaluator, and present a defense. If probable cause is not found, the petition is dismissed and the individual reports to parole. If counsel fails to mount a meaningful defense, the client loses that opportunity entirely — and may spend years in pretrial detention at Coalinga State Hospital waiting for a trial that should never have been ordered.

Critical Reality: In the overwhelming majority of SVP Probable Cause Hearings in California, defense attorneys appear without a retained defense expert, conduct little or no meaningful cross-examination of the state's evaluator, and present no defense case. Courts routinely find probable cause not because the evidence compels it, but because it is never meaningfully tested. This is not a function of the law — it is a function of inadequate preparation. The client pays for this inadequacy with months or years of additional confinement.

B. Statutory Rights at the Probable Cause Hearing: WIC § 6603

Welfare and Institutions Code section 6603(a) sets out the rights of a person subject to the SVPA in unambiguous terms. Defense counsel must know these rights and enforce them. The statute provides:

"A person subject to this article is entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on the person's behalf, and to have access to all relevant medical and psychological records and reports. If the person is indigent, the court shall appoint counsel to assist that person and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf."

— *Welfare and Institutions Code § 6603(a)*

Although section 6603 addresses the trial proceeding, its rights provisions apply with equal force to the Probable Cause Hearing. The right to the assistance of counsel at the PCH is separately confirmed in WIC section 6602(a), which provides that the person named in the petition is entitled to assistance of counsel at the probable cause hearing.

The right to access all relevant medical and psychological records and reports is not limited to trial — it is essential to any meaningful defense at the PCH and must be obtained before the hearing, not after.

1. The Right to Retain Experts — Plural

The Legislature's use of the word "experts" in section 6603(a) is not casual. The statute states the person is entitled to "retain experts or professional persons to perform an examination on the person's behalf." The use of the plural is significant. It reflects the Legislature's recognition that SVP evaluations are complex, multifaceted, and not reducible to a single opinion from a single examiner. The state routinely presents two evaluators at trial — both of whom have found the individual meets the SVP criteria. The defense is entitled to retain as many independent experts as the defense requires to adequately respond.

In practice, the most effective defense approach involves retaining at minimum: (1) a licensed forensic psychologist or psychiatrist qualified to conduct an independent SVP evaluation and testify that the individual does not meet criteria; and (2) where the resources and the case warrant it, a separate expert in actuarial risk assessment methodology who can testify to the limitations, scoring errors, and misapplication of Static-99R and Stable-2007 independent of any overall SVP opinion. The statute authorizes this. Indigent clients are entitled to court appointment of experts necessary to mount a meaningful defense.

2. The Right to All Relevant Records

Section 6603(a) guarantees the individual access to all relevant medical and psychological records and reports. This is not merely the final evaluation report submitted by the state's evaluators. It encompasses all DSH evaluation records from every referral cycle — including any prior evaluations in which evaluators concluded the individual did not meet SVP criteria. It encompasses the raw data, scoring sheets, and test protocols underlying the current evaluation. It encompasses psychological testing results, treatment records, and prior risk assessment scores.

Defense counsel must file a discovery request before the PCH that specifically identifies each category of records the defense requires. Evaluations and raw data withheld from defense experts cannot be meaningfully challenged. A court that denies access to records needed for defense expert review is denying the client a right expressly guaranteed by statute.

Counsel Must: Obtain every prior DSH evaluation in every referral cycle, the complete raw data and scoring materials for every actuarial instrument scored in the current evaluation, all psychological testing results including any instruments showing results favorable to the defense, and all treatment records including progress notes and

treatment provider assessments. File a written discovery motion if the state resists production of any of these materials.

C. The Constitutional Mandate: United States v. Cronic and the Adversarial Process

United States v. Cronic 466 U.S. 648 (1984)

Core Holding: The right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial process has been conducted, the kind of testing envisioned by the Constitution has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Critical Stage Doctrine: The Court established that prejudice is presumed — without any specific showing — when: (1) the accused is denied counsel at a critical stage of the proceedings; (2) counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; or (3) although counsel is available, the likelihood that any competent lawyer could provide effective assistance is so small that a presumption of prejudice is warranted. The first two categories are directly implicated by common PCH defense failures in SVPA practice.

1. The PCH as a Critical Stage

The Probable Cause Hearing in an SVPA case is unquestionably a critical stage of the proceedings. The deprivation of liberty at stake — continued detention of a person who has completed his criminal sentence, potentially for years, pending a trial that may not occur for years more — is as serious as any liberty deprivation the legal system can impose short of a capital sentence. The right to counsel attaches at critical stages, and the Sixth Amendment protection *Cronic* describes applies with full force.

California courts have recognized that the right to effective assistance of counsel applies in SVPA proceedings. Where SVPA commitment is functionally equivalent to indefinite incarceration, the constitutional standards for effective assistance cannot be understood to permit the passive, non-adversarial approach that characterizes too many PCH appearances by defense counsel.

2. Failure to Test the State's Case Is Constitutional Error

Cronic establishes that when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, prejudice is presumed as a matter of law. No specific showing that the outcome would have been different is required. This standard is directly applicable to the SVPA PCH where counsel appears without a defense expert, conducts no meaningful cross-examination of the state's evaluator, presents no defense evidence, and makes no argument challenging any element of the SVP criteria.

When that occurs, the adversarial process has broken down entirely. The court is receiving the state's evidence without meaningful challenge. The evaluator's opinions — which are not the product of independent clinical assessment for the purpose of the hearing but are instead reports prepared by state-designated evaluators operating within a system that produces SVP findings at high rates — are accepted without cross-examination, without competing expert opinion, and without any of the testing that a genuine adversarial proceeding would demand.

The *Cronic* Standard Applied: An attorney who appears at the PCH without a retained defense expert, without having reviewed the actuarial research, and without a prepared cross-examination strategy has not provided representation at all in any constitutionally meaningful sense. The state's case has not been tested. The adversarial process has not occurred. Under *Cronic*, this is structural error that does not require a showing of prejudice to constitute a violation of the right to effective assistance of counsel.

3. Defense Evaluators Who Will Find the Individual Does Not Meet Criteria

One of the most persistent misconceptions in SVPA practice — sometimes used to justify the failure to retain a defense expert — is that no qualified evaluator will conclude that an individual does not meet the SVP criteria when the state's evaluators have found that he does. This is factually wrong.

There is a substantial community of qualified forensic psychologists and psychiatrists who conduct independent SVP evaluations for the defense and regularly conclude that individuals do not meet the legal criteria for commitment. These evaluators reach those conclusions on legitimate clinical and actuarial grounds: diagnosis is not established, volitional impairment is not independently demonstrated, actuarial scores are miscalculated or misinterpreted, reference group selection inflates risk estimates, protective factors are inadequately addressed, or the overall adjusted actuarial methodology is not followed.

The adversarial allegiance effect — documented in peer-reviewed research — demonstrates that evaluators working primarily for the prosecution and those working primarily for the defense apply the same instruments and reach systematically different

conclusions. This is not a function of corruption; it reflects genuine professional disagreement about how to apply uncertain scientific tools to individual cases. Defense evaluators exist, they are qualified, and courts accept their testimony. The failure to retain one is a strategic choice with devastating consequences for the client — not an unavoidable feature of the landscape.

Counsel Must: Identify and retain a qualified independent forensic evaluator before the PCH. For indigent clients, file a formal motion for appointment of a defense expert with the court, citing WIC § 6603(a) and the constitutional requirements of *Cronic*. Do not accept the premise that no qualified evaluator will disagree with the state. Contact ATSA members, forensic psychology practitioners, and defense-aligned forensic evaluation practices to identify evaluators with demonstrated experience in SVP defense evaluations.

D. The Research on Volitional Impairment: The Foundation of Cross-Examination

Volitional impairment is the constitutional linchpin of every SVP commitment. *Kansas v. Crane* requires its independent demonstration. Yet it is simultaneously the element that existing risk assessment instruments are least equipped to measure — and the element evaluators most often address through circular reasoning rather than clinical analysis. Defense counsel must understand the scientific literature on volitional impairment to develop an effective cross-examination strategy.

1. No Validated Instrument Measures Volitional Impairment

Peer-reviewed research published in the Journal of the American Academy of Psychiatry and the Law has identified a fundamental problem with SVP evaluations as currently conducted: volitional impairment is systematically ignored by all existing risk assessment instruments. Static-99R, Stable-2007, and every other actuarial tool in common SVP use was designed and validated to assess the statistical likelihood of sexual recidivism — not to measure an individual's capacity for behavioral control.

As the research establishes: "Without the systematic assessment of volitional impairment, generic risk measures cannot address SVP determinations." The implication for cross-examination is direct: the evaluator has used instruments that measure recidivism risk to answer a different question — whether the individual has serious difficulty controlling his behavior — and those instruments provide no validated basis for that answer.

2. The Circular Reasoning Problem

The most common methodology evaluators use to address volitional impairment is to point to the individual's prior offense history and argue that repeated offending despite known consequences demonstrates impaired behavioral control. This is the same offense history used to establish the qualifying convictions, to support the diagnosis, and to generate the actuarial risk score. Every element of the SVP criteria ends up resting on the same foundation.

Kansas v. Crane specifically and directly rejected this approach. The Supreme Court required something more than a history of prior offenses to establish volitional impairment. It required clinical evidence that the diagnosed mental disorder actually impairs the ability to control behavior. An evaluator who cannot point to clinical evidence of volitional impairment beyond the offense history itself has not satisfied the *Crane* standard and has not satisfied the DSH Clinical Evaluator Handbook's requirement for specific behavioral evidence of impaired control.

The DSH Clinical Evaluator Handbook identifies specific types of evidence that can support a volitional impairment finding: poor institutional behavior, reoffending after treatment, marked impulsivity, and reoffending immediately after release. These are specific behavioral markers, not generalized references to the prior offense record. Cross-examination should expose whether the evaluator identified any of these specific markers or instead relied exclusively on the circular recitation of prior crimes.

3. The Professional Consensus on the Limits of Volitional Assessment

The scientific and professional community has recognized the difficulty of assessing volitional impairment for over two decades. The American Bar Association, addressing the analogous issue in the insanity defense context, argued for the elimination of volitional impairment standards on the ground that "there is still no accurate scientific basis for measuring one's capacity for self-control or for calibrating the impairment of such capacity." The American Psychiatric Association reached similar conclusions in the context of federal insanity cases.

The DSM-5 itself contains a cautionary statement for forensic use, noting the "imperfect fit between questions of ultimate concern to the law and the information contained in a clinical diagnosis." Diagnoses per se cannot be automatically equated with the SVP volitional impairment standard. An evaluator who leaps from a DSM diagnosis to a conclusion of volitional impairment without independent clinical analysis has misapplied both the diagnostic framework and the legal standard.

Cross-Examination Strategy: Establish that the evaluator knows of no validated instrument that directly measures volitional impairment. Establish that the evaluator relied on the same offense history to support diagnosis, volitional impairment, and risk

— and that this is circular. Establish what specific clinical evidence, beyond the offense history itself, the evaluator identified in support of the volitional impairment finding. If the evaluator cannot identify specific behavioral markers of impaired control beyond the prior offenses, the *Crane* standard has not been met.

E. The "Policeman at the Elbow" Test: Volitional Impairment in SVP Proceedings

Legal Recognition, Scholarly Status, and Cross-Examination of DSH Evaluators

I. What Is the "Policeman at the Elbow" Test?

The "policeman at the elbow" test is one of the most widely recognized formulations of the volitional impairment standard in Anglo-American law. At its core, it asks a single question about a person's capacity for behavioral self-control: would the person have committed the act even if a police officer had been standing directly at their elbow at the moment of commission? If the answer is yes — if the person would have acted despite the certain presence of law enforcement — then the impulse to act is treated as truly irresistible, reflecting a profound inability to conform behavior to the law. If the person would have refrained had a police officer been present, the inference is that the impulse was not irresistible and that some capacity for self-control remained.

The test originated in English common law as a judicial illustration of the irresistible impulse doctrine — itself an extension of the M'Naghten cognitive incapacity standard. The earliest documented judicial use of the policeman imagery traces to a Victorian-era observation by Lord Bromwell, recorded in *People v. Hubert*, 119 Cal. 216, 223–224 (1897), in which a witness testifying to a defendant's lack of control admitted under questioning that the defendant would not have committed the act if a policeman had been present. Lord Bromwell observed, in language that became the test's foundational illustration, that an impulse is irresistible only if the offender would have acted even with a police officer at his elbow. If the presence of law enforcement would have stopped the act, then the impulse was not irresistible.

As the Michigan Court of Appeals described in *People v. Jackson* (2001) (discussing the test in the volitional insanity context): "The origin of the 'policeman at the elbow' standard shows that it was rooted in the discredited all-or-nothing approach of the 'irresistible impulse' test." The test's name has become shorthand in forensic mental health and legal discourse for the broader question of whether a person's mental

disorder actually deprived them of the capacity to control their conduct — or whether they simply chose not to control it.

II. Is the Test Widely Used and Recognized?

(a) General Recognition Across American Law

The "policeman at the elbow" test is widely recognized in American criminal and mental health law as the classic formulation of the irresistible impulse standard for volitional incapacity. It appears in case law from Alabama, California, Michigan, military courts, and courts in multiple other jurisdictions. It is taught in law schools, examined in forensic mental health literature, referenced in treatises on the insanity defense, and cited in forensic evaluations as a conceptual benchmark for assessing volitional control.

The first successful criminal insanity defense using the irresistible impulse standard — and its policeman at the elbow formulation — occurred in *Parsons v. State*, 81 Ala. 577 (1887), where the Alabama Supreme Court held that a person whose mental disease left them unable to resist an impulse to commit a crime should not be held criminally responsible, even if they knew the act was wrong. This landmark ruling established the test's legal pedigree in American courts and became the foundation for subsequent adoption of the volitional prong in insanity jurisprudence across the country.

At the federal level, the test's conceptual core was referenced in *United States v. Kunak*, 17 CMR 346, 359 (1954), where the military court observed that "if a person would be deterred from committing the act by the presence of an arresting officer, he has the mental capacity to adhere to the right and resist its commission." This phrasing directly tracks the policeman at the elbow logic and confirms its currency in federal proceedings. The test also informed the early federal circuit court interpretation of the volitional prong before the Insanity Defense Reform Act of 1984 curtailed the volitional component of the federal insanity defense.

> *People v. Hubert, 119 Cal. 216, 223–224 (1897): Early California Supreme Court reference to the Lord Bromwell judicial illustration — the foundational statement of the policeman at the elbow test.*
> *Parsons v. State, 81 Ala. 577 (1887): First successful American insanity acquittal under the irresistible impulse / policeman at the elbow standard.*
> *United States v. Kunak, 17 CMR 346, 359 (1954): Federal military court affirming the principle that deterrence by police presence implies retained capacity for self-control.*
> *People v. Jackson (2001), Michigan Court of Appeals: Detailed analysis of the test's origins, its connection to the discredited all-or-nothing irresistible impulse standard, and its supersession by the Model Penal Code's "substantial capacity" formulation.*

(b) The Test's Relationship to the Model Penal Code — Recognized but Superseded

While the policeman at the elbow test is widely recognized, courts and the legal academic community have consistently treated it as a discredited and overly restrictive formulation of volitional incapacity when applied as the sole or controlling test. The test's fundamental problem is that it demands proof of total incapacity — the defendant would have offended even in the most extreme deterrent circumstances — rather than the more realistic standard of substantial difficulty in controlling conduct.

The American Law Institute's Model Penal Code (MPC), developed in the 1950s and widely adopted by the states, replaced the all-or-nothing irresistible impulse test — and its policeman at the elbow formulation — with the volitional prong of the MPC's insanity test: a person is not responsible for criminal conduct if, as a result of mental disease or defect, they "lack[] substantial capacity... to conform [their] conduct to the requirements of law." The MPC's use of "substantial capacity" rather than total incapacity was a deliberate rejection of the policeman at the elbow test's implication that anything short of complete volitional collapse is insufficient to establish the defense. As the Michigan Court of Appeals in *People v. Jackson* (2001) held: applying the policeman at the elbow standard to a substantial capacity statute improperly shifts the test back toward the discredited restrictive reading of the old irresistible impulse test.

> *Model Penal Code § 4.01 (ALI 1962): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law."*
> *People v. Jackson (2001), Mich. Ct. App.: "While defendant's acknowledgment that he could have conformed if a law enforcement official were present is one factor that may be considered, it is not a paramount hurdle that must be surmounted. To say that when making such a concession, a defendant will have a more difficult time establishing that he lacks the substantial capacity to conform, tends to improperly shift the statutory standard back toward the discredited restrictive reading of the old 'irresistible impulse' test."*
> *M.P.C. § 4.01, Comment p. 172, n. 18: "The question is not properly put in terms of whether he would have capacity to conform in some untypical restraining situation — as with a... policeman at his elbow."*

(c) Recognition in SVP Proceedings — The Crane Standard

The policeman at the elbow test's conceptual legacy is directly relevant to SVP proceedings because the test frames the outer bounds of what the Supreme Court in *Kansas v. Crane* (2002) 534 U.S. 407 rejected as the constitutional standard for SVP commitment. In Crane, the United States Supreme Court addressed whether SVP commitment requires proof that a person is completely unable to control their sexually

violent behavior — essentially the policeman at the elbow standard's absolute incapacity requirement — or whether something less than total incapacity suffices.

The Court held that the Constitution does not require proof of complete inability to control behavior. Instead, it requires proof of "serious difficulty in controlling behavior" — a standard deliberately less demanding than the irresistible impulse test and its policeman at the elbow formulation, but more demanding than mere propensity to reoffend. As the Court explained in *Kansas v. Hendricks* (1997) 521 U.S. 346, the mental disorder must result in "volitional impairment rendering [the person] dangerous beyond their control" — language that establishes a middle ground between the old irresistible impulse test's total incapacity requirement and the everyday dangerousness that characterizes the typical recidivist. The *Crane* standard — serious difficulty, not complete inability — is the constitutional floor for SVP volitional impairment.

In California SVP proceedings, *People v. Williams* (2003) 31 Cal.4th 757 confirmed that the SVPA's language — which requires a diagnosed mental disorder affecting emotional or volitional capacity predisposing the person to sexually violent acts — satisfies *Crane's* serious difficulty standard. The California Supreme Court held that if a person cannot control their dangerous behavior to the extent they are predisposed to commit criminal sexual acts and become a menace to others, they have sufficient volitional impairment to be found an SVP. *People v. Wollschlager* (2002), 99 Cal.App.4th 1303, similarly confirmed that *Crane* does not require proof of complete loss of control — serious difficulty suffices — while acknowledging that the constitutional floor remains above mere propensity.

> *Kansas v. Crane (2002) 534 U.S. 407, 413: "[T]here must be proof of serious difficulty in controlling behavior."*
> *Kansas v. Hendricks (1997) 521 U.S. 346, 358: The mental disorder must result in "volitional impairment rendering them dangerous beyond their control."*
> *People v. Williams (2003) 31 Cal.4th 757: SVPA language satisfies Crane; a person predisposed to criminal sexual acts by a qualifying disorder has sufficient volitional impairment.*
> *People v. Wollschlager (2002) 99 Cal.App.4th 1303: Crane does not require complete loss of control; the SVPA's language presumes serious difficulty in controlling behavior.*

III. The Test's Current Legal Status: Recognized, But Not the Controlling Standard

BOTTOM LINE ON LEGAL STATUS

The 'policeman at the elbow' test is universally recognized in American law as the classic expression of the irresistible impulse standard for volitional incapacity.

The test is used by forensic evaluators, referenced in courts, and cited in legal and psychiatric literature as a conceptual benchmark for volitional assessment.

Courts have consistently rejected the test as the controlling legal standard for either criminal insanity or SVP commitment because it demands total incapacity rather than the more nuanced 'substantial capacity' (MPC) or 'serious difficulty' (*Crane*) standard.

In SVP proceedings, the governing standard is *Kansas v. Crane's* 'serious difficulty in controlling behavior' — not the all-or-nothing irresistible impulse test. An evaluator who uses 'serious difficulty' language is applying the correct legal standard. An evaluator who applies a stricter standard approaching total incapacity is applying an incorrect standard that benefits the defense. An evaluator who applies a looser standard not grounded in actual behavioral evidence is vulnerable to cross-examination.

For SVP defense attorneys, the test's most powerful use is not as the controlling legal standard but as a cross-examination tool to expose the methodological basis — or absence of basis — for an evaluator's volitional impairment conclusion.

The American Psychiatric Association's Position

After the 1982 John Hinckley insanity acquittal following the Reagan assassination attempt, the American Psychiatric Association issued a formal statement that has significantly shaped the legal and clinical debate over volitional impairment standards. The APA stated that "the line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk." This statement — quoted approvingly by Justice Breyer in his Crane concurrence — reflects the medical profession's deep skepticism about the clinical reliability of volitional impairment assessments.

The APA's skepticism extends to the policeman at the elbow test specifically: the test is intuitive and legally elegant, but it does not map cleanly onto clinical reality. A person may defer commission of an act when a police officer is present not because they have genuine capacity for self-control, but because they have sufficient awareness of immediate consequences to delay — a calculation that does not reliably indicate anything about their underlying volitional capacity. The test conflates situational deterrence with genuine volitional control. In SVP cross-examination, this distinction is precisely where the attack on the evaluator's volitional conclusions must be directed.

IV. Using the "Policeman at the Elbow" Concept in Cross-Examination of DSH Evaluators

Understanding the policeman at the elbow test — its origins, its recognized status, and its judicial rejection as an all-or-nothing standard — gives the SVP defense attorney a sophisticated and multi-directional cross-examination tool. The goal is to expose the evaluator's volitional impairment conclusion as clinically unsupported, methodologically vague, or derived from an incorrect legal standard. There are four main attack vectors, each grounded in the case law and literature described above.

(a) Attack Vector 1: No Behavioral Evidence of Actual Volitional Impairment

The evaluator's conclusion that the client has serious difficulty controlling sexually violent behavior must be grounded in specific, identifiable behavioral evidence — not in the existence of a diagnosis or in historical offense conduct alone. *Kansas v. Crane* is clear: the mental disorder must cause serious difficulty controlling conduct. A diagnosis of pedophilic disorder, for example, does not by itself establish volitional impairment. As the DSM-5 itself states, a clinical diagnosis is not sufficient to establish the legal existence of a mental disorder, and having the diagnosis does not demonstrate that a particular individual was unable to control their behavior at a particular time.

Cross-examination using the policeman at the elbow concept attacks this methodological gap directly: if the evaluator is relying on offense history alone — historical acts committed when no police officer was present — the attorney can expose the circularity of that reasoning. Historical offenses show that the person offended in circumstances where offense was possible. They do not show that the person could not have refrained. The policeman at the elbow test, used analytically, asks whether the evaluator has any basis — clinical, behavioral, or empirical — to conclude that the person would have offended even if law enforcement had been present. If the evaluator has no such basis, the volitional conclusion collapses into speculation.

Q: *Did the client ever commit or attempt to commit a sexually violent act when law enforcement was actually present, or when apprehension was certain?*

- Purpose: Establishes that offense history reflects opportunity-dependent conduct, not irresistible compulsion.
- If the answer is no: ask the evaluator how they distinguish between a person who committed acts when detection was unlikely and a person who has genuine serious difficulty controlling behavior.
- Follow-up: Are you aware of any instance in which the client acted despite certain or immediate law enforcement presence? If not, what is the behavioral basis for your conclusion that he would do so?

Q: *During the client's years at Coalinga, what specific behavioral incidents have occurred that demonstrate serious difficulty controlling sexually violent impulses?*

- Purpose: Forces the evaluator to identify current behavioral evidence rather than rely on decades-old offense facts.
- If the evaluator cannot point to specific institutional incidents: 'So you have no documented behavioral incident in the past [X] years at Coalinga demonstrating serious difficulty in controlling sexually violent behavior — correct?'
- The absence of current behavioral evidence is powerful: it means the evaluator is extrapolating volitional impairment from historical conduct rather than from current clinical observation.

(b) Attack Vector 2: The Evaluator's Test Is Too Strict or Too Loose

Courts have rejected both extremes of volitional assessment: the all-or-nothing irresistible impulse test (too strict) and a mere propensity or statistical likelihood standard (too loose). The *Crane* standard is precise: serious difficulty — more than an average person's difficulty, but not total incapacity. An evaluator who applies either extreme is applying the wrong standard.

IF THE EVALUATOR APPEARS TO APPLY AN ALL-OR-NOTHING STANDARD

Cross-examine on the legal standard: 'Is it your opinion that the client has absolutely no capacity to control his sexual conduct — that nothing, including the threat of immediate detection or arrest, would deter him?'

If the evaluator retreats from absolute incapacity: 'So you would agree that under sufficiently strong external constraints — like the certain presence of a police officer — the client might be deterred from acting? Then the question is not whether he has zero control, but whether his difficulty is serious enough to meet the *Crane* standard.'

Legal basis: *Kansas v. Crane* (2002) 534 U.S. 407 — the Constitution does not require proof of complete inability to control behavior.

IF THE EVALUATOR RELIES ON OFFENSE HISTORY ALONE WITHOUT CLINICAL VOLITIONAL ANALYSIS

Cross-examine on circularity: 'You concluded the client has serious difficulty controlling his behavior primarily because he committed [prior offenses]. Is prior offending the basis of your volitional conclusion?'

Force the distinction: 'The fact that someone committed sexual offenses in the past tells us they offended — it does not by itself tell us whether they had serious difficulty controlling the decision to offend. Couldn't a person with full capacity for self-control simply have chosen to offend?'
Legal basis: *Kansas v. Hendricks* and *Crane* require that the mental disorder must distinguish the person from the dangerous-but-typical recidivist. Mere prior offending applies equally to non-SVP recidivists and does not establish volitional impairment.

(c) Attack Vector 3: The Evaluator Cannot Define What Constitutes "Serious Difficulty"

The Supreme Court in *Crane* deliberately refused to define "serious difficulty in controlling behavior" with precision, stating that safeguards of liberty are "not always best enforced through precise bright-line rules." This deliberate ambiguity is a double-edged sword: it gives evaluators flexibility, but it also means that their methodology for measuring volitional impairment is often poorly defined, inconsistently applied, and methodologically opaque. Cross-examination can exploit this directly.

Q: *How do you operationally define 'serious difficulty in controlling behavior' as you use that term in your evaluation?*

- Purpose: Forces the evaluator to articulate a testable definition. Most evaluators do not have one.
- Follow-up: 'Is there any validated psychological test or instrument that measures volitional impairment directly?'
- Context: The forensic literature (Scurich, Martinez & Krauss, 2025; Rogers, Jackson & Shuman) consistently notes that volitional impairment is assessed without validated tools and that evaluators apply widely varying and inconsistent criteria.
- Further follow-up: 'How do you distinguish serious difficulty from moderate difficulty? What criteria determine where on that spectrum my client falls?'

Q: *What specifically distinguishes your client from what the Supreme Court called the 'dangerous but typical recidivist' who does not qualify for SVP commitment?*

- Purpose: Targets the critical *Crane* requirement that the disorder must distinguish the SVP from ordinary recidivists.
- This question forces the evaluator to articulate why the volitional impairment goes beyond ordinary recidivism — a distinction many evaluations fail to

adequately draw.
- Follow-up: 'Other sex offenders who have been released and not reoffended — do they also have the same diagnosis? If so, what volitional factor specific to my client distinguishes him from them?'

(d) Attack Vector 4: The Policeman at the Elbow Test as a Clinical Assessment Tool — and Its Limits

Some DSH evaluators use the policeman at the elbow concept affirmatively in their evaluations — asking whether the client would have offended even if detection were certain, or exploring what situational factors would deter reoffending. The forensic literature confirms this is a recognized (if criticized) clinical assessment technique. Peer-reviewed forensic research, including the Maryland study published in the Journal of the American Academy of Psychiatry and the Law (Journal of AAPL 2009), documents that evaluators use "hypothetical tests of volitional ability (such as the policeman at the elbow test, in which the evaluator poses questions to determine if a defendant would have committed the same offense in the presence of a police officer, or despite the likelihood of immediate apprehension)" as factors in determining volitional impairment.

When an evaluator has used this type of analysis — or when the defense can argue that the evaluator should have used it — the cross-examination opportunity is significant. If the evaluator's own report or testimony demonstrates that the client would be deterred by law enforcement presence or certain detection, then by the evaluator's own implied standard, the client does not meet the irresistible impulse formulation of volitional incapacity. And if the evaluator has not explored deferability, planning, or situational deterrence at all, the methodology is incomplete.

Q: *Did you explore whether the client has the capacity to defer acting on sexual impulses in the presence of external constraints — such as law enforcement, supervision, or monitoring?*
- Purpose: Introduces the 'deferability' factor documented in forensic literature as a relevant indicator of volitional capacity.
- If the answer is no: 'Forensic literature on volitional impairment assessment identifies deferability — the ability to refrain from acting for a period of time — as a relevant clinical factor. You did not assess deferability in this case?'
- Follow-up: 'If the client could defer acting in the presence of supervision or monitoring, does that inform your conclusion about the seriousness of his difficulty in controlling behavior?'

Q: *Did any of the client's prior offenses occur in circumstances where he had planned the act, selected the victim, or taken steps to avoid detection?*

- Purpose: Offenses involving planning, selection, and avoidance of detection are evidence of purposeful, controlled conduct — which is inconsistent with serious volitional impairment.
- Legal context: Virginia courts have held that evidence of planning prior to the crime is inconsistent with irresistible impulse. The same logic applies to volitional impairment in SVP proceedings.
- Follow-up: 'If the client was capable of planning, selecting, and avoiding detection, doesn't that suggest he had the capacity to conform his conduct — the capacity to choose whether to act and how to do so?'

V. The Deferability Factor: The Policeman at the Elbow's Clinical Successor

Contemporary forensic mental health evaluation of volitional impairment uses a cluster of behavioral and situational factors rather than the single policeman-at-the-elbow hypothetical. Chief among these is deferability — the clinical assessment of whether a person is capable of refraining from an impulse for a period of time, even if they ultimately act on it. Deferability is documented in the peer-reviewed forensic evaluation literature as one of the factors that bear on volitional capacity in insanity and civil commitment evaluations.

The clinical factors now used to assess volitional impairment include: (1) the presence or absence of deferability; (2) whether the person perceived negative consequences for acting; (3) whether the person had perceived alternatives to acting; (4) evidence of planning, preparation, or deliberation prior to acting; and (5) hypothetical tests of volitional ability — including the policeman at the elbow test. (See: Janofsky et al., Journal of the American Academy of Psychiatry and the Law (2009), documenting these factors as used by Maryland forensic evaluators in insanity cases.)

For SVP defense purposes, deferability is a particularly powerful concept because it maps directly onto what the *Crane* "serious difficulty" standard requires. A person who can defer acting on a sexual impulse — who can delay, redirect, or inhibit — does not have a complete inability to control their conduct. If the evaluator has not assessed deferability, the volitional conclusion is methodologically incomplete. If the evaluator has assessed it and the evidence suggests the client deferred acting in many circumstances, the conclusion that serious difficulty exists is directly contradicted by the evaluator's own findings.

VI. Master Cross-Examination Sequence: Volitional Impairment Challenge

The following is a consolidated cross-examination sequence for use with any DSH evaluator who has offered a volitional impairment conclusion. The sequence is designed to be modular — each block can be used independently or in combination, depending on the specific weaknesses in the evaluation.

BLOCK 1 — ESTABLISH THE CONTROLLING LEGAL STANDARD

- Q: You are familiar with *Kansas v. Crane* (2002), the United States Supreme Court decision on the volitional component of SVP commitment?
- Q: *Crane* requires proof of 'serious difficulty in controlling behavior' — not complete inability, but serious difficulty. You agree that is the applicable standard?
- Q: The standard does not require that the person have zero capacity for self-control — some capacity may remain, and the person still qualifies. Correct?
- Q: And the standard also distinguishes the person subject to SVP commitment from what the Court called 'the dangerous but typical recidivist' who does not qualify. Correct?
- Purpose: Pins the evaluator to the correct legal standard and establishes the critical distinction from ordinary recidivism — setting up later questions.

BLOCK 2 — IDENTIFY THE BEHAVIORAL BASIS FOR THE VOLITIONAL CONCLUSION

- Q: Your report concludes that [client] has serious difficulty controlling sexually violent behavior. What specific current behavioral evidence supports that conclusion?
- Q: You reviewed [client]'s Treatment Team Reports from Coalinga for the past [X] years. Were there documented incidents of sexual misconduct or sexually violent behavior during that period?
- Q: If there were no such documented incidents, on what behavioral basis did you conclude that serious difficulty currently exists?
- Q: Is it possible for a person to have once had serious difficulty controlling behavior but to no longer have serious difficulty — due to treatment, aging, changed circumstances?
- Purpose: Forces the evaluator to identify specific current behavioral evidence, or to admit the conclusion is based on historical offense facts rather than current clinical observation.

BLOCK 3 — THE POLICEMAN AT THE ELBOW CHALLENGE

- Q: You are familiar with the 'policeman at the elbow' concept in the clinical assessment of volitional impairment?
- Q: The concept asks whether a person would commit an act even in the presence of a police officer — that is, even when detection and apprehension are certain. You're familiar with that test?
- Q: Did you assess whether [client] has ever committed or attempted to commit a sexually violent act when law enforcement was present or when detection was certain?
- Q: If [client] was never able to point to an instance of offending in the presence of law enforcement, does that inform your volitional conclusion?
- Q: Alternatively — if the evaluation does not include any assessment of how the client would behave under direct supervision, monitoring, or the presence of law enforcement, how can you conclude that his difficulty in controlling behavior would persist under those conditions?
- Purpose: Directly applies the policeman at the elbow analysis to expose the gap between historical offense evidence and a conclusion about current, supervision-independent volitional impairment.

BLOCK 4 — DEFERABILITY AND PLANNING EVIDENCE

- Q: Did you assess deferability — the client's capacity to refrain from acting on a sexual impulse for a period of time — as part of your evaluation?
- Q: Did any of [client]'s prior offenses involve planning, deliberation, or steps to avoid detection?
- Q: If yes: isn't planning — selecting a victim, choosing a location, taking steps to avoid being caught — evidence that the person was making deliberate, controlled decisions rather than acting on an uncontrollable impulse?
- Q: Forensic literature identifies evidence of planning as relevant to volitional capacity assessment. Did you consider it in forming your conclusion about volitional impairment?
- Purpose: Uses planning evidence — which the prosecution often introduces as aggravation — defensively, to show controlled, deliberate decision-making inconsistent with serious volitional impairment.

BLOCK 5 — METHODOLOGICAL CHALLENGE: NO VALIDATED INSTRUMENT

- Q: Is there a validated psychological test or instrument that directly measures

volitional impairment in sex offenders?

- Q: How did you operationally define 'serious difficulty in controlling behavior' in this evaluation?
- Q: How do you distinguish serious difficulty from moderate difficulty? What criteria determine where on that spectrum [client] falls?
- Q: The Static-99R and Stable-2007 are risk assessment instruments — they assess the probability of future reoffending, not volitional impairment specifically. Would you agree with that distinction?
- Q: If there is no validated instrument for measuring volitional impairment, and you have not identified specific current behavioral evidence, on what clinical basis does your volitional conclusion rest?
- Purpose: Exposes the methodological weakness in volitional impairment conclusions — which forensic literature confirms are regularly made without validated tools or consistent criteria.

VII. Case Law and Authority Summary

FEDERAL AND U.S. SUPREME COURT AUTHORITIES

Kansas v. Crane (2002) 534 U.S. 407: Controlling standard for SVP volitional impairment is 'serious difficulty in controlling behavior.' Complete inability not required; mere propensity insufficient. Rejects all-or-nothing irresistible impulse / policeman at the elbow standard.

Kansas v. Hendricks (1997) 521 U.S. 346: SVP mental disorder must produce 'volitional impairment rendering them dangerous beyond their control.' Distinguishes SVPs from dangerous-but-typical recidivists.

United States v. Kunak, 17 CMR 346, 359 (1954): Federal military court: deterrence by police presence implies retained capacity for self-control — the classic policeman at the elbow principle stated at federal level.

Richard S. v. Carpinello, 589 F.3d 75 (2d Cir. 2009): Second Circuit applies *Crane's* serious difficulty standard to insanity acquittee commitment; confirms volitional impairment must be shown but does not require a separate finding independent of mental illness nexus.

STATE COURT AUTHORITIES

People v. Hubert, 119 Cal. 216 (1897): California Supreme Court's earliest reference to the Lord Bromwell policeman at the elbow illustration — foundational California statement of the test.

Parsons v. State, 81 Ala. 577 (1887): First successful American insanity acquittal under irresistible impulse / policeman at the elbow standard.

People v. Jackson (2001), Mich. Ct. App.: The policeman at the elbow standard is rooted in the discredited all-or-nothing irresistible impulse test; applying it under a substantial capacity statute improperly narrows the volitional defense.

People v. Williams (2003) 31 Cal.4th 757: California Supreme Court confirms SVPA language satisfies *Crane*; predisposition to criminal sexual acts by qualifying disorder = sufficient volitional impairment.

People v. Wollschlager (2002) 99 Cal.App.4th 1303: *Crane* does not require complete loss of control; SVPA presumes serious difficulty where person cannot control predisposition to criminal sexual acts.

FORENSIC LITERATURE AUTHORITIES

Janofsky et al. (2009), Journal of AAPL: Documents use of policeman at the elbow test by forensic evaluators in Maryland insanity cases as one of multiple volitional assessment factors, alongside deferability, planning, perceived consequences, and perceived alternatives.

Rogers, Jackson & Shuman (2005), Journal of AAPL: Notes absence of validated instruments for SVP volitional assessment; criticizes retrofitting of generic risk measures to address volitional criteria.

Scurich, Martinez & Krauss (2025): Empirical study of forensic professional assessment of volitional impairment in SVP commitment proceedings; documents striking lack of empirical knowledge and inconsistent application of criteria.

American Psychiatric Association Statement (1983): 'The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.' Quoted in *Kansas v. Crane* concurrence; foundational statement of clinical skepticism about volitional assessment.

Model Penal Code § 4.01, Comment p. 172, n. 18 (ALI 1962): 'The question is not properly put in terms of whether he would have capacity to conform in some untypical restraining situation — as with a policeman at his elbow.'

F. The Static-99R: Research, Limitations, and Cross-Examination

The Static-99R is the most widely used actuarial risk assessment instrument in SVP evaluations in the United States. Surveys of forensic evaluators confirm that approximately 96% use it in SVP cases, with most giving it significant weight in their overall risk conclusions. Its widespread use and the authority evaluators claim for its findings make it a primary target for defense cross-examination. Defense counsel must understand what the Static-99R actually is, what it validly measures, and where its limitations are most pronounced.

1. What Static-99R Measures — and What It Does Not

The Static-99R is a ten-item actuarial scale that uses static — unchangeable — historical factors to generate a score associated with statistical likelihood of sexual recidivism. It does not measure volitional impairment. It does not assess the presence of a mental disorder. It does not establish that a diagnosed condition predisposes an individual to sexually violent conduct. It produces a number that places the individual in a relative risk category compared to a normative sample of sexual offenders. That number, standing alone, answers none of the legal questions required for SVP commitment.

The instrument was developed and validated on samples of sexual offenders from Canada, the United Kingdom, and other countries — not primarily on the institutionalized SVP population in California. Its applicability to long-term civilly committed individuals is an assumption, not a demonstrated empirical fact.

2. Absolute Recidivism Rates Are Highly Variable and Often Overstated

The most important research finding for cross-examination purposes is the documented instability of absolute recidivism rate estimates associated with Static-99R scores. A comprehensive meta-analysis by Helmus, Hanson, and colleagues examined Static-99R calibration across multiple field validity studies and found that the normative data significantly overestimated actual recidivism: the norms estimated 73% more recidivists than there actually were in field samples.

Stated directly: when state evaluators present Static-99R scores with associated recidivism rate estimates — “this individual has a 40% chance of sexual reoffense over the next five years” — those estimates are based on normative data that has been demonstrated to substantially overestimate actual recidivism in applied settings. The

instrument's developers themselves have acknowledged the instability of absolute recidivism estimates across samples and settings.

3. Reference Group Selection: Adversarial Allegiance in Practice

Static-99R scoring requires the evaluator to select a normative reference group from which recidivism rate estimates are derived. Research published by Boccaccini and colleagues surveyed 109 forensic evaluators conducting SVP assessments and documented systematic differences in reference group selection based on which side retained the evaluator.

> ***Boccaccini et al. (2014) — PubMed —*** Defense evaluators systematically endorsed reporting practices conveying the lowest possible risk level and highest uncertainty; prosecution evaluators systematically endorsed practices conveying the highest possible risk level. State agency evaluators — the evaluators who produce DSH reports used in SVP proceedings — most closely resembled prosecution evaluators in their reporting practices.

This is not a peripheral finding. It means that the reference group the state's evaluator selected to generate the recidivism rate estimate presented to the court is likely the group that produces the highest estimate, not the group most scientifically appropriate for the individual being evaluated. Cross-examination must explore the evaluator's reference group selection rationale and expose that alternative, equally defensible reference group selections would produce substantially lower risk estimates.

4. The Age Correction and the Offense-Free Effect

Static-99R includes an age correction that reduces scores for older offenders, reflecting the well-documented decline in sexual recidivism risk with age. Research confirms that the risk of sexual recidivism predictably declines the longer an individual remains offense-free, even while incarcerated. For individuals who have been continuously institutionalized for many years — which describes the majority of SVP respondents at the PCH stage — the age and offense-free effects have direct and substantial bearing on current risk.

Cross-examination should establish whether the evaluator properly applied the age correction, and whether the evaluator adequately addressed the research on offense-free periods and risk reduction for institutionalized individuals. Static-99R scores that are presented without these adjustments, or with adjustments improperly calculated, are potentially misleading to the court.

5. Static-99R Score Errors

Each of the ten Static-99R items has specific coding rules that must be followed. Scoring errors are not uncommon and each error directly affects the total score, the risk category, and the associated recidivism rate estimates. Defense counsel must obtain the complete scoring sheet and have it independently reviewed by a defense expert before the PCH. Common scoring errors include miscoding the age-at-release item, improperly counting non-contact sexual offenses, incorrectly scoring the any stranger victim item, and misapplying coding rules for prior sentencing dates.

A single point error in a Static-99R score can move an individual from the high-risk to the moderate-risk category. At the moderate-risk level, the recidivism estimates associated with the score may be insufficient to support a finding of a "substantial danger — serious and well-founded risk" of reoffense under the *Ghilotti* standard. Scoring accuracy is therefore not a technical nicety — it is a threshold issue with direct legal consequences.

Cross-Examination Strategy: Obtain the complete Static-99R scoring sheet and coding rationale. Have a defense expert independently score every item. Challenge reference group selection and the associated recidivism rate estimates. Establish the overestimation of recidivism documented in peer-reviewed meta-analyses. Address the age correction and offense-free period research. Present the lower recidivism estimate that a defensible alternative reference group would produce. Establish that the evaluator's conclusion of "high risk" rests on an estimate that the instrument's own developers have acknowledged overstates actual reoffense rates.

G. The Stable-2007: Dynamic Risk Factors, Institutionalization, and Cross-Examination

The Stable-2007 is a dynamic risk assessment instrument designed to supplement static risk assessments by measuring changeable — dynamic — risk factors associated with sexual recidivism. It consists of 13 items organized into five domains: significant social influences, intimacy deficits, sexual self-regulation, general self-regulation, and cooperation with supervision. In SVP evaluations, the Stable-2007 is used to adjust the Static-99R baseline risk estimate upward or downward based on these dynamic factors.

The instrument was developed and validated on a community supervision sample — offenders on parole or probation who were being actively assessed by community supervision officers across time. This is the single most important fact defense counsel must understand about Stable-2007 and must communicate through cross-examination in every SVP case.

1. The Institutionalization Problem

The DSH Clinical Evaluator Handbook itself acknowledges the core limitation of Stable-2007 in SVP evaluations in direct and unambiguous terms: “For offenders who have been incarcerated continuously over lengthy periods of time the dynamic factors will have less relevance.” This is not a fringe critique — it is a limitation the state’s own operational handbook expressly identifies.

The Stable-2007 was validated on offenders living in the community, being assessed by community supervision officers who could observe their behavior, relationships, and compliance over time. The 13 items it assesses — intimacy deficits, cooperation with supervision, sexual self-regulation — are evaluated in a community context where behavior is observable and meaningful. When those same items are scored on an individual who has been continuously institutionalized at Coalinga State Hospital for five, ten, or fifteen years, the scoring is necessarily based on institutionalized behavior observed in a controlled, artificial environment, not on the community behavior the instrument was designed to measure.

2. Dynamic Factors Scored in a Static Environment

Consider the specific problem of scoring “cooperation with supervision” for an individual who has been confined at Coalinga State Hospital for a decade. The item was designed to assess willingness to comply with community supervision requirements: check-ins, polygraph testing, restrictions on movement, conditions of parole. An SVP respondent does not have community supervision — he has institutional rules. Scoring institutional compliance as a proxy for community supervision cooperation introduces a systematic error into the assessment.

Similarly, “intimacy deficits” items assess the quality and stability of adult romantic and social relationships. Individuals who have been institutionalized for extended periods have been prevented — by the conditions of their confinement — from forming or maintaining adult relationships in any meaningful sense. Scoring intimacy deficits on such an individual and then using those scores to argue that dynamic risk factors elevate community recidivism risk confuses the product of institutional deprivation with an independent clinical finding.

3. Stable-2007 and the Prediction of Sexual Recidivism

Peer-reviewed research on Stable-2007’s predictive validity for sexual recidivism specifically — as opposed to general or violent recidivism — presents a more limited picture than evaluators typically acknowledge. Research conducted on high-intensity treatment program samples has found that Stable-2007 did not significantly predict

sexual violence specifically, though its scores were associated with general and nonsexual violent recidivism.

The incremental validity of Stable-2007 over and above Static-99R for sexual recidivism specifically is the relevant question in SVP proceedings, and that incremental contribution has been found to be limited in some studies after controlling for the static risk score. Cross-examination should establish what the evaluator's claimed contribution of the Stable-2007 dynamic assessment is to the overall risk conclusion, whether that claim is supported by the specific literature on sexual recidivism prediction, and whether the instrument's validation sample is applicable to a long-term institutionalized individual.

4. Upward Adjustments Based on Stable-2007 Are Particularly Vulnerable

When an evaluator uses Stable-2007 to argue that dynamic risk factors warrant an upward adjustment from the Static-99R baseline — moving the individual from a moderate to a high risk conclusion — that adjustment is particularly vulnerable to challenge given the institutionalization limitation. The adjustment is being made on the basis of dynamic factor scores derived from institutional behavior, scored with an instrument designed for community samples, in a setting the instrument was never validated to address. Each element of that chain is a point of cross-examination attack.

The DSH Clinical Evaluator Handbook's own acknowledgment that dynamic factors "will have less relevance" for the long-term institutionalized provides the foundation. Defense counsel should then establish through cross-examination or defense expert testimony: how long the individual has been continuously institutionalized; which specific Stable-2007 items the evaluator scored and on what behavioral evidence; how the evaluator accounted for the institutionalization limitation; and what the risk conclusion would be if the Stable-2007 adjustment were set aside and only the Static-99R baseline were considered.

Cross-Examination Strategy: Establish that Stable-2007 was validated on a community supervision sample, not institutionalized individuals. Establish how long this individual has been continuously institutionalized. Establish what behavioral evidence, observable in a community setting, the evaluator used to score each Stable-2007 item. Establish that the DSH Clinical Evaluator Handbook itself states that dynamic factors have less relevance for the long-term institutionalized. Establish what the overall risk conclusion would be without the Stable-2007 upward adjustment. For each item scored as a risk indicator, establish whether the behavior observed is a product of institutional deprivation rather than an independent clinical finding.

H. Preparing the Defense: What Competent PCH Representation Requires

Effective representation at the Probable Cause Hearing is not the product of a few hours of preparation on the eve of the hearing. It is the result of a systematic preparation process that begins the moment counsel is appointed or retained and continues through the date of the hearing. The following represents the minimum preparation required for competent representation at an SVPA PCH.

1. Obtain All Records Immediately

DSH Evaluations: All evaluations from the current referral cycle and all prior referral cycles, including any evaluations in which the evaluator concluded the individual did not meet criteria.

Raw Data and Scoring Materials: The complete scoring sheets, coding rationales, and underlying data for every actuarial instrument administered, including Static-99R, Stable-2007, and any phallometric or sexual interest assessments.

Psychological Testing: All psychological test results including any instruments showing results negative for pedophilia or paraphilia (ABEL/AASI-3, PPG, or other sexual interest assessments).

Treatment Records: All treatment records from DSH or prior institutional treatment, including progress notes, treatment tier placements, and treatment provider assessments.

Prior Criminal and Mental Health History: All underlying criminal records, prior mental health evaluations, and records from prior placements used as the factual basis for the current evaluation.

2. Retain a Defense Expert Before the PCH

Retaining a defense expert is not optional for competent representation at the PCH. It is constitutionally required under the framework *Cronic* establishes. Counsel must identify and retain a qualified forensic psychologist or psychiatrist experienced in SVP defense evaluations, provide that expert with all records obtained in discovery, allow sufficient time for the expert to review the records and conduct an independent examination of the client, and receive a written or oral report of the expert's findings before the PCH.

If the client is indigent, counsel must file a motion for appointment of a defense expert pursuant to WIC § 6603(a) as early as possible. Courts that deny such motions deprive the client of a right expressly guaranteed by the statute. If a motion for appointment is

denied, counsel should make a clear record of the request and the denial for purposes of any subsequent review.

3. Study the Scientific Literature

Cross-examination of a forensic psychologist at the PCH requires preparation that goes beyond reading the evaluator's report. Defense counsel must be familiar with the core scientific literature on Static-99R and Stable-2007, including the research on recidivism rate instability, reference group selection, adversarial allegiance, the institutionalization limitation of dynamic risk assessments, and the absence of validated instruments for measuring volitional impairment directly.

Key research areas and associated sources defense counsel should obtain and study before any SVP PCH include the following. The Helmus, Hanson, and colleagues meta-analysis on Static-99R calibration and the overestimation of recidivism rates in field samples. The Boccaccini and colleagues research on adversarial allegiance in Static-99R reporting practices. The Hanson and colleagues research on the variability of absolute recidivism rates across samples. The Rogers and Shuman research on the limits of diagnosis in forensic contexts and the absence of validated instruments for volitional impairment. The DSH Clinical Evaluator Handbook itself, which identifies instrument limitations that the evaluator is required to acknowledge and often does not.

4. Prepare a Written Cross-Examination Outline

Cross-examination of an SVP evaluator should not be conducted from memory or improvised at the hearing. Defense counsel must prepare a written cross-examination outline organized by the specific areas of attack identified above: the qualifying conviction analysis, the diagnostic methodology, the volitional impairment finding, the Static-99R scoring and reference group selection, the Stable-2007 institutionalization limitation, the protective factors analysis, the voluntary treatment consideration, and the predatory finding. Each area should have specific questions anchored to specific record citations or research findings.

The goal of cross-examination at the PCH is not merely to undermine the evaluator's credibility in the abstract. It is to establish, through the evaluator's own admissions, that one or more elements of the SVP criteria have not been adequately supported — and therefore that probable cause does not exist as a matter of law. A well-prepared cross-examination, supported by a defense expert, can and does result in dismissal of SVP petitions at the PCH stage.

5. Consider Filing a *Ghilotti* Motion

Before, at, or after, the PCH, defense counsel should evaluate whether the evaluation contains material legal errors that warrant a *Ghilotti* Motion challenging the legal sufficiency of the evaluation. As addressed in detail in Section 2 of this handbook, material legal errors include violations of the DSH Clinical Evaluator Handbook, prohibited V Code diagnoses, volitional impairment findings that rest on circular reasoning without independent behavioral evidence, Static-99R scoring errors, Stable-2007 misapplication, inadequate protective factors analysis, and missing or deficient predatory findings.

A well-grounded *Ghilotti* Motion filed in advance of the PCH can result in the court excluding the evaluation from evidence entirely, or limiting the evaluator's testimony to legally permissible opinions. Combined with a defense expert, *Ghilotti* Motions represent the most powerful pre-trial tools available to SVPA defense counsel.

I. Summary: What the PCH Demands of Defense Counsel

The Probable Cause Hearing in an SVPA case is a critical stage of the proceedings at which the state's case must be subjected to meaningful adversarial testing. The failure to do so is not a tactical choice — it is a constitutional violation under *United States v. Cronic* that presumptively prejudices the client without requiring a specific showing of harm.

WIC § 6603 expressly guarantees the SVP respondent the right to retain experts — plural — to perform examinations and participate in the proceedings. Defense evaluators who will conclude that an individual does not meet the SVP criteria exist, are qualified, and regularly testify in SVPA proceedings. The adversarial allegiance research confirms that evaluation outcomes differ systematically based on who retains the evaluator, and defense-retained experts regularly reach conclusions the state's evaluators do not.

The scientific literature on Static-99R and Stable-2007 provides multiple, well-documented avenues of cross-examination attack: recidivism rate overestimation, reference group selection bias, institutionalization limitations, scoring errors, and the complete absence of validated instruments for volitional impairment assessment. An attorney who has studied this literature, retained a defense expert, obtained all discovery, and prepared a written cross-examination outline is prepared to mount a genuine defense at the PCH. An attorney who has not done these things has provided no defense at all.

J. Civil Code Of Procedure

Discovery as a Defense Weapon

SVPA proceedings are civil in nature. That single fact unlocks an entire arsenal of discovery tools that are rarely, if ever, deployed in the average SVP case. Civil discovery — interrogatories, requests for admissions, demands for production of documents, and depositions — can be used to systematically pin down the state's evaluators before they ever take the witness stand. The attorney who masters these tools gains something the typical SVP defense attorney never has: sworn, pre-hearing commitments from the evaluator that can be used to expose inconsistency, bias, methodology failures, and factual error when the witness testifies.

a. The Civil Nature of SVPA Proceedings and the Availability of Civil Discovery

California's Sexually Violent Predator Act creates a civil, not criminal, commitment proceeding. The California Supreme Court has repeatedly recognized this distinction. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1171 ["The SVPA proceeding is civil in nature"]; *People v. McKee* (2010) 47 Cal.4th 1172, 1186-1187.) Because the proceeding is civil, the California Civil Discovery Act — Code of Civil Procedure sections 2016.010 through 2036.050 — applies in full. There is no statutory exception carving SVPA proceedings out of the civil discovery framework.

This has profound implications for defense practice. Civil discovery gives the defense the ability to compel sworn, pre-hearing responses from the opposing party and its designated experts on questions of methodology, factual basis, and opinion formation — before the hearing begins, before the evaluator can tailor testimony to anticipated cross-examination, and before the court has been exposed to the state's framing of the case.

1. The Three Controlling Cases — What the Law Actually Says

Before deploying civil discovery, counsel must understand exactly what the controlling appellate authority establishes — because courts and prosecutors frequently misstate it. Three published California Court of Appeal decisions define the discovery landscape in SVPA cases.

Leake v. Superior Court (2001) 87 Cal.App.4th 675

Leake was the first published appellate decision to address whether the Civil Discovery Act applies to SVPA proceedings. The trial court had ruled it inapplicable. The Court of

Appeal reversed, dismissing the People's policy arguments — that civil discovery would replace informal cooperation with expensive litigation — as arguments properly directed to the Legislature, not the court. The statutory language controlled.

HOLDING — Leake v. Superior Court (2001) 87 Cal.App.4th 675

"The Civil Discovery Act of 1986 applies to SVPA proceedings."

Leake v. Superior Court (2001) 87 Cal.App.4th 675, 682

Leake introduced the scope limitation that would govern all subsequent cases: because SVPA proceedings present only two narrow issues at trial, the scope of permissible discovery is circumscribed by those issues. The 'narrow issue and the need for expeditious adjudication' are legitimate grounds for managing discovery — but they do not eliminate the right to discovery altogether.

People v. Superior Court (*Cheek*) (2001) 94 Cal.App.4th 980

Cheek was decided months after *Leake* by a different Court of Appeal panel. The People had moved to quash deposition notices served by two SVP respondents, arguing the Civil Discovery Act did not apply. The trial court denied the motions. The People sought writ relief.

HOLDING — People v. Superior Court (Cheek) (2001) 94 Cal.App.4th 980

"The Civil Discovery Act of 1986 (Code Civ. Proc., § 2016 et seq.) applies in SVPA proceedings and therefore the deposition method of discovery is available."

People v. Superior Court (*Cheek*) (2001) 94 Cal.App.4th 980, 984

CRITICAL: THE MOST COMMON MISREADING IN SVP PRACTICE

Cheek confirmed that depositions are available because depositions were the only discovery tool at issue — the People moved to quash deposition notices, so the court ruled on depositions. This does not mean only depositions are available. The court addressed what was before it. No language in *Cheek* prohibits interrogatories, document demands, or respondent-propounded requests for admissions. Any prosecutor or court staff member who tells you '*Cheek* means only depositions are allowed' has misread the case.

The *Cheek* court vacated the trial court orders and remanded for reconsideration under the Act's management provisions — directing the court to evaluate whether the specific depositions at issue were within the permissible scope, not to deny all discovery. The remand was for the exercise of discretion, not for blanket denial. Courts have authority under CCP § 2017.020 to limit discovery where the burden outweighs the likely benefit, and that authority applies with particular force in SVP proceedings given the narrow issues — but it is case-specific discretion, not a categorical prohibition.

Murillo v. Superior Court (2006) 143 Cal.App.4th 730

Murillo arose when the District Attorney propounded 14 requests for admissions on the SVP respondent targeting the ultimate issues the state was required to prove — his prior qualifying convictions and his propensity to engage in predatory behavior in the future. Murillo sought a protective order. The trial court denied it. After writ proceedings that reached the California Supreme Court and were remanded, the Court of Appeal issued a published decision holding the DA's RFAs impermissible.

HOLDING — Murillo v. Superior Court (2006) 143 Cal.App.4th 730

"Requests for admissions may not be propounded in proceedings under the [SVPA] because their use would eviscerate the Act's requirement that the state prove its case beyond a reasonable doubt and, where the case is tried to a jury, obtain a unanimous verdict before a person may be committed. To relieve the state of this burden would deprive a person of liberty interests in violation of the right to due process."

Murillo v. Superior Court (2006) 143 Cal.App.4th 730, 730-731

The *Murillo* court's reasoning rested on three pillars:

- **RFAs are structurally incompatible with the SVPA's burden of proof.** Unlike depositions, interrogatories, and document demands — which seek to uncover information — requests for admissions seek to eliminate the need for proof entirely. An admission under CCP § 2033.410 is conclusive; no contradictory evidence may be introduced without court permission to withdraw the admission. Allowing the prosecution to use this device against the respondent would strip the state of its constitutional obligation to prove its case beyond a reasonable doubt.
- **The cost-of-proof sanctions trap.** The court illustrated the due process problem using the DA's Request No. 12: 'Admit that you currently have a diagnosed mental disorder as defined by WIC § 6600(d).' If the respondent denies the request and cannot obtain an expert to contradict the diagnosis at trial, he faces cost-of-proof sanctions under CCP §

2033.420 for the denial. This dynamic would effectively coerce respondents into admitting the ultimate issues the state is constitutionally required to prove.

- **Lack of mutuality and gamesmanship concerns.** RFAs lack the reciprocity present in other discovery tools. It is difficult to conceive of requests a respondent might propound that would serve any practical purpose, while the prosecution could use them to systematically eliminate its burden — the precise kind of litigation gamesmanship the Civil Discovery Act was designed to prevent.

MURILLO PROHIBITS THE PROSECUTION — NOT THE RESPONDENT

Every element of the *Murillo* holding is respondent-protective. The case was brought by the respondent seeking a protective order against the District Attorney's RFAs. The constitutional logic — that RFAs targeting ultimate issues strip the state of its obligation to prove the case beyond a reasonable doubt — applies only when it is the prosecution propounding the RFAs. The respondent bears no burden of proof in an SVPA proceeding.

Nothing in *Murillo* prohibits the respondent from propounding requests for admissions directed at the prosecution or the state's evaluators. Respondent-propounded RFAs targeting foundational and methodological facts — what records were reviewed, what instruments were used, what published literature the evaluator is aware of — do not relieve the state of its burden. They are binding factual stipulations that narrow evidentiary disputes. They remain available to the defense.

2. What the Three Controlling Cases Do and Do Not Hold

Misrepresentation of these holdings is common in SVP courtrooms. Counsel must be able to correct it with precision.

***Leake* (2001)**	The Civil Discovery Act applies to SVPA proceedings. Scope of all discovery is limited to the two narrow SVPA trial issues.
***Cheek* (2001)**	Depositions are available. Courts have discretion under CCP § 2017.020 to limit specific discovery requests — but not to categorically prohibit all written discovery.
***Murillo* (2006)**	The prosecution may NOT propound RFAs against the respondent targeting ultimate SVPA issues. This prohibition runs one direction only — it does not limit the respondent's discovery rights.

None of the three	Hold that interrogatories are prohibited.
None of the three	Hold that document demands are prohibited.
None of the three	Hold that respondent-propounded RFAs are prohibited.
None of the three	Hold that only depositions are available.
None of the three	Hold that a court may categorically exclude all written discovery without case-specific analysis.

PRACTICE NOTE

If a court or prosecutor tells you 'only depositions are available' or 'written discovery is not permitted in SVP cases,' ask for the specific case citation. Neither *Leake*, *Cheek*, nor *Murillo* says that. If a specific court order in your case categorically prohibits all written discovery, that order is a candidate for writ petition to the Court of Appeal under *Leake*.

b. Interrogatories — Pinning Down the Evaluator's Methodology Under Oath

Code of Civil Procedure section 2030.010 authorizes any party to propound written interrogatories — questions to be answered under oath by the opposing party. Parties to an unlimited civil action may propound up to 35 specially prepared interrogatories as a matter of right, with additional interrogatories available by declaration and court order. (CCP §§ 2030.030, 2030.040, 2030.050.) The responding party has 30 days to provide sworn written answers, verified under penalty of perjury. (CCP § 2030.250.)

In an SVPA case, interrogatories serve a purpose that no other discovery device replicates: they extract, under oath, the factual and methodological claims the state's evaluator has made or will make, before the evaluator has the opportunity to adjust those claims to anticipated cross-examination. Every statement in the interrogatory responses becomes a sworn prior statement. Any departure from those sworn statements at the probable cause hearing is a prior inconsistent statement usable to impeach.

The scope of interrogatories in SVPA proceedings — as with all civil discovery — is circumscribed by the two narrow SVPA trial issues under WIC § 6600(a): (1) the qualifying prior conviction(s), and (2) the mental disorder and likelihood of engaging in sexually violent criminal behavior. All interrogatories must be targeted to these issues; interrogatories that stray beyond this scope are subject to objection and limitation under CCP § 2017.020. However, interrogatories squarely aimed at the evaluator's

methodology, the data underlying the diagnosis, and the basis for the risk assessment are unquestionably within scope.

1. Interrogatories Directed to the State's Evaluation Methodology

The most powerful use of interrogatories in SVPA proceedings is to pin down, in the evaluator's own words and under oath, the specific methodology applied in reaching each conclusion. The following categories must be covered.

► Qualifying Conviction Analysis

Identify each conviction the evaluator relied upon as a qualifying predicate offense, the statutory basis for characterizing it as qualifying, and the specific records reviewed to reach that conclusion. If the evaluator's report lists a conviction as qualifying without a statutory citation or without identifying the records reviewed, the interrogatory responses will either expose the gap or compel the evaluator to fill it in a way that can be tested at hearing.

► Diagnostic Methodology

Identify the specific DSM-5 criteria the evaluator applied in diagnosing the respondent, the specific behavioral evidence relied upon for each required criterion, and any diagnostic instruments administered. Interrogatories should separately ask whether any instrument was administered that produced results not supporting the diagnosis, and if so, why those results were not included in the report. This is the vehicle for forcing the evaluator to account for omitted ABEL/AASI-3, PPG, or other test results that showed no deviant sexual interest.

► Volitional Impairment

Identify the specific behavioral evidence, beyond the prior offense history, that the evaluator relied upon to support the volitional impairment finding. Identify any validated instrument administered to measure volitional impairment directly. Ask whether the evaluator is aware that no currently validated actuarial instrument directly measures volitional impairment as required by *Kansas v. Crane*.

► Static-99R Scoring

Identify each of the ten scored items, the specific factual basis for each item's scoring, the specific normative reference group selected, the reasons for selecting that reference group over alternatives, the specific recidivism rate estimate communicated to the court, and whether the evaluator is aware of the Helmus et al. (2022) meta-analytic finding that Static-99R normative data overestimated actual recidivism rates by 73% in field samples.

► Stable-2007 Administration

Identify how long the respondent has been continuously institutionalized, identify which Stable-2007 items were scored above zero, identify the specific institutional behavioral evidence used to score each such item, and identify whether the evaluator is aware that the DSH Clinical Evaluator Handbook states that for offenders continuously incarcerated over lengthy periods, dynamic factors will have 'less relevance.'

► Protective Factors

Identify each protective factor considered, each protective factor rejected and the reason for rejection, and whether the evaluator applied the adjusted actuarial methodology required by the DSH Clinical Evaluator Handbook — including whether voluntary treatment participation was specifically considered and weighed.

► Prior Evaluations

Identify whether the evaluator is aware of any prior DSH evaluation in which a different evaluator concluded the respondent did not meet SVP criteria, and if so, whether that prior evaluation was considered and why the current evaluator reached a different conclusion.

WHY INTERROGATORY RESPONSES ARE STRATEGICALLY VALUABLE

These interrogatories do not merely generate information — they create a set of locked sworn positions. The evaluator who gives a complete answer is pinned to a methodology that can be attacked at hearing. The evaluator who gives an evasive or incomplete answer has committed an interrogatory response that is itself evidence of inadequate foundation. Either outcome advances the defense.

c. Requests for Admissions — Binding Concessions That Cannot Be Walked Back

Code of Civil Procedure section 2033.010 authorizes any party to request that any other party admit the truth of specified facts, the genuineness of specified documents, or the truth of specified legal conclusions. Each admitted matter is conclusively established for purposes of the proceeding and cannot be contradicted by evidence without court permission to withdraw the admission. (CCP § 2033.410.)

As established in *Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, the prosecution may not use this device against the SVP respondent to eliminate the state's burden of proof. But *Murillo's* prohibition runs one direction only. Respondent-propounded RFAs directed at the People or the state's evaluators are not prohibited by *Murillo, Cheek*, or any other published decision. They are available, and they are powerful.

1. Strategic Uses of Requests for Admissions

Requests for admissions in SVPA cases should target two categories: (1) factual matters that are objectively verifiable and that the People should be compelled to admit, and (2) methodological and scientific matters that establish the foundation for expert cross-examination. All requests must be tethered to the two SVPA trial issues — diagnosis/risk and qualifying convictions — to survive scope challenges under CCP § 2017.020.

► Factual Concessions on Instrument Limitations

Request admission that no currently published, peer-reviewed, and validated psychological instrument directly measures an individual's capacity for volitional control as required by *Kansas v. Crane.* Request admission that the Static-99R was developed and normed on samples that did not include individuals continuously institutionalized for more than ten years. Request admission that the Stable-2007 was developed and validated on community supervision samples, not institutionalized populations. These admissions establish, in the state's own binding words, the foundational limitations of every instrument the evaluator used.

► Admissions Regarding Omitted Evidence

If the defense has evidence that specific psychological testing results favorable to the respondent were administered but not reported, request admission that those instruments were administered and that the results showed a specific outcome. A denial of a demonstrably true fact is an admission of dishonesty. An admission of the fact is a binding concession that the evaluator omitted favorable evidence.

► Admissions on Prior Evaluations

If prior DSH evaluations in which the respondent was found not to meet SVP criteria exist, request admission that such evaluations exist and were reached by qualified DSH-designated evaluators using the same regulatory framework. This creates a binding record of disagreement within the state's own evaluation system that must be addressed at hearing.

► Admissions on Reference Group Selection

Request admission that the high-risk/high-need normative sample used to generate the recidivism rate estimate was specifically selected because the respondent was pre-selected on risk-relevant characteristics — i.e., was being evaluated precisely because he was a potential SVP. Request admission that the routine normative sample recidivism rate estimate for the same Static-99R score is substantially lower than the estimate presented in the evaluation.

TACTICAL NOTE: A DENIAL IS ALSO EVIDENCE

An evaluator who denies that the Stable-2007 was developed on community supervision samples — when the instrument's own validation study says exactly that — has provided a prior statement under oath that contradicts published peer-reviewed research. That denial can be exposed at the hearing in devastating fashion. A denial of a clearly demonstrable factual matter in response to requests for admissions is powerful impeachment in its own right.

If the People or their evaluator unreasonably denies a well-founded factual request and that fact is subsequently proven at the hearing, cost-of-proof sanctions under CCP § 2033.420 become available. This is an additional lever — the prospect of sanctions creates incentive for the prosecution to admit facts it cannot legitimately dispute.

d. Demands for Production of Documents — Every Record the Evaluator Touched

Code of Civil Procedure section 2031.010 authorizes any party to demand that any other party produce and permit inspection of specified categories of documents, electronically stored information, or tangible things in the party's possession, custody, or control. Production demands in SVPA cases reach everything the state's evaluator reviewed, generated, or relied upon in forming the opinions presented at the hearing.

The respondent's statutory right under WIC § 6603(a) to 'access to all relevant medical and psychological records and reports' operates independently of the Civil Discovery Act and reinforces the right to full production. Courts that restrict production of foundational records are not only exercising misguided discretion — they are denying the defense the ability to meaningfully test the state's case, which implicates both due process and the express statutory guarantee.

Defense counsel must serve production demands that are specific, comprehensive, and timed to give the defense sufficient review time before the hearing. Every document category listed below should be demanded without exception.

1. Document Categories That Must Be Demanded

► All Raw Data

Every scoring sheet, coding worksheet, and numerical calculation underlying every actuarial instrument scored in the evaluation — including Static-99R item-by-item scoring sheets, Stable-2007 item-by-item scoring sheets, and any other instrument administered.

► All Psychological Test Protocols

The complete test protocols, scoring records, and results for every psychological instrument administered to the respondent, including any instrument — such as the ABEL Assessment for Sexual Interest (AASI-3), PPG, or any other sexual interest assessment — in which the results were not included in the final evaluation report.

► The Evaluator's Working Notes

Every note, memorandum, draft report, or electronic record the evaluator created in the course of the evaluation, including interview notes and any notes made during review of records.

► All Records Reviewed

Every document, report, record, or file the evaluator reviewed in forming the opinions in the evaluation, identified by document title, source, and date.

► Prior DSH Evaluations

Every DSH evaluation of the respondent from every prior referral cycle, regardless of outcome, including evaluations in which the evaluator found the respondent did not meet SVP criteria.

► The Evaluator's Curriculum Vitae and Publications

The evaluator's complete CV, including all publications, testimony history, and any documented positions on the scientific reliability of Static-99R, Stable-2007, or volitional impairment assessment methodology.

► Communications With DSH or the District Attorney

Every written or electronic communication between the evaluator and the Department of State Hospitals, the district attorney's office, or any state agency regarding this specific case or regarding SVP evaluation methodology generally.

Documents produced in response to a production demand must be provided to the defense expert. A defense expert who has reviewed the same records the state's evaluator reviewed — including records the evaluator did not mention in the report — is in a powerful position to expose evidentiary gaps and to testify that the omitted records undercut the state's evaluation conclusions.

e. Depositions — The Most Powerful Tool in the Discovery Arsenal

Code of Civil Procedure section 2025.010 authorizes any party to take the oral deposition of any person, including any party, as a matter of right. Depositions are taken under oath, before a certified court reporter, with full opportunity for examination and cross-examination. The deposition transcript is a sworn prior statement. Every inconsistency between the deposition and hearing testimony is a prior inconsistent

statement usable under Evidence Code section 1235. Every commitment the evaluator makes in the deposition is a locked position that forecloses evasion at the hearing.

The availability of depositions in SVPA cases was confirmed in both *Leake v. Superior Court* (2001) 87 Cal.App.4th 675 and *People v. Superior Court* (*Cheek*) (2001) 94 Cal.App.4th 980. *Cheek* arose specifically because the People tried to quash deposition notices — and the court refused, confirming depositions are available as a matter of right.

The deposition of the state's evaluator is the single most powerful discovery tool available in SVPA practice, and it is almost never used. This is a catastrophic failure of defense preparation. An attorney who walks into the PCH having deposed the state's evaluator holds every advantage. An attorney who has not deposed the evaluator is encountering the witness for the first time at the hearing, with no prior commitments and no locked positions.

1. What the Evaluator's Deposition Must Cover

The deposition of an SVP evaluator should be organized around each element of the SVP criteria and each instrument used in the evaluation. The following areas are the minimum that must be covered.

► Background and Bias

The evaluator's total number of SVP evaluations conducted as a state-designated evaluator versus independent defense evaluations. The percentage of state evaluations in which the evaluator concluded the respondent met SVP criteria. Whether the evaluator has ever concluded that a state-referred respondent did not meet criteria. The evaluator's compensation for SVP evaluations. Any prior testimony on behalf of the defense in SVPA cases. This line of questioning establishes adversarial allegiance on the record before any substantive testimony is locked in.

► Qualifying Conviction Analysis

Walk the evaluator through each conviction identified as a predicate offense, the specific statutory section and subdivision applied, the specific records reviewed, and any ambiguity in the conviction record. Force the evaluator to commit to a specific legal basis for every qualifying conviction conclusion.

► Diagnostic Foundation

Require the evaluator to articulate, on the record, each DSM-5 criterion applied and the specific behavioral evidence supporting each criterion. Require identification of every diagnostic instrument administered. Require the evaluator to explain the result of every instrument administered — including any instrument not mentioned in the report. An

evaluator who administered the ABEL Assessment for Sexual Interest (AASI-3) and received results showing no sexual interest in the charged victim category but did not include those results in the report must explain that omission under oath, and that explanation will be available for use at the hearing.

► Volitional Impairment Methodology

Require the evaluator to identify the specific behavioral evidence, beyond the prior offense history, that supports the volitional impairment finding. Require the evaluator to identify any peer-reviewed, validated instrument that directly measures volitional impairment as required by *Kansas v. Crane*. Require the evaluator to explain how the volitional impairment conclusion is distinguished from circular reasoning based solely on the prior offense record. An evaluator who cannot answer these questions at the deposition cannot answer them at the hearing — and at the deposition, the inability to answer is locked in the record.

► Static-99R and Stable-2007 Methodology

Require the evaluator to justify each scored item, identify the reference group selected and the reasons for that selection versus alternative groups, identify the specific recidivism rate estimate and its source in the normative tables, and respond to each scientific limitation identified in the peer-reviewed literature. Ask specifically whether the evaluator is aware that the Helmus et al. (2022) meta-analysis found that Static-99R normative data overestimated actual recidivism by 73% in field samples. Ask how long the respondent has been continuously institutionalized and how that bears on the Stable-2007 dynamic risk assessment. Force the evaluator to commit, on the record, to every methodological claim made in the report.

► Protective Factors and Voluntary Treatment

Require the evaluator to identify each protective factor considered, each factor rejected, and the reason for rejection. Require the evaluator to explain how voluntary treatment participation was weighed. Require the evaluator to identify the research basis for concluding that each protective factor did not reduce assessed risk below the statutory threshold.

2. Using the Deposition at the Probable Cause Hearing

Deposition testimony can be used at the probable cause hearing in multiple ways. Under Evidence Code section 1291, a prior statement made under oath in a deposition may be offered to prove the truth of the matter asserted if the witness is available for cross-examination. Under Evidence Code section 1235, any prior inconsistent statement — including deposition testimony — may be introduced to impeach the witness's credibility.

An evaluator who testified at the deposition that the routine normative sample would yield a 15% recidivism rate for the respondent's Static-99R score, but who testifies at the hearing that the respondent has a 40% recidivism estimate using the high-risk/high-need normative sample, has made statements that can be placed side by side before the court. The court must then grapple with why the state's evaluator chose the sample that doubles the risk estimate. That is precisely the adversarial testing the Civil Discovery Act makes possible.

COUNSEL MUST

Begin civil discovery immediately upon appointment or retention. Serve interrogatories and production demands within the first days of appointment. Notice the state's evaluator's deposition with sufficient lead time to complete it, review the transcript, provide it to the defense expert, and incorporate the evaluator's locked positions into the cross-examination outline before the hearing. Consider serving respondent-propounded requests for admissions targeting foundational methodological facts — the prosecution cannot use RFAs against you (*Murillo*), but you can use them against their evaluator. An attorney who fails to use civil discovery in an SVPA case has left the most powerful set of defense tools unused.

f. The Statutory Framework

i. CCP § 2016.020(a) — Scope of the Civil Discovery Act

The Civil Discovery Act 'applies to every civil action and every special proceeding of a civil nature, unless there is a statutory exemption.' (CCP § 2016.020(a).) SVPA proceedings are civil special proceedings. *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 established that SVPA proceedings are civil in nature. There is no statutory exemption for SVPA proceedings.

ii. CCP § 2017.020 — Court's Discretion to Limit Discovery

The Civil Discovery Act specifically authorizes courts to limit discovery: 'The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.' This is the statutory basis on which courts legitimately restrict written discovery in SVPA proceedings — not a categorical rule, but a case-by-case balancing.

iii. CCP § 2019.010 — Methods of Discovery

The Act provides six methods of discovery: (1) oral and written depositions; (2) interrogatories; (3) inspection demands; (4) requests for admissions; (5) physical and mental examinations; and (6) exchanges of expert witness information. All six methods are available in civil proceedings. *Leake* and *Cheek* did not eliminate methods 2 through 6 — they established that the scope of all methods is limited to the two SVPA trial issues. *Murillo* added a single, one-directional carve-out: the prosecution may not use method 4 (requests for admissions) against the respondent because doing so would unconstitutionally eliminate the state's burden of proof. *Murillo* does not restrict the respondent's use of any discovery method.

iv. WIC § 6603(a) — Respondent's Access to Records

WIC § 6603(a) specifically provides that a person subject to the SVPA is entitled to 'have access to all relevant medical and psychological records and reports.' This statutory entitlement is independent of the Civil Discovery Act and provides an additional basis to demand records from the state's evaluators and the Department of State Hospitals — including the complete records reviewed in preparing the SVP evaluation.

g. Writ Review Of Discovery Rulings

Normally, California appellate courts do not provide writ review of pretrial discovery orders. The SVPA context is an exception, because discovery rulings in SVP cases raise significant legal issues of first impression and can effectively deny the respondent the ability to prepare a meaningful defense. Both *Leake* and *Cheek* were writ proceedings.

i. Grounds for Writ Petition

A writ petition challenging an SVPA discovery ruling would be appropriate where:

- The trial court categorically ruled that all written discovery is prohibited in SVPA proceedings as a matter of law (legal error, not discretionary ruling).
- The trial court denied specific discovery without evaluating relevance to the two narrow SVPA trial issues.
- The trial court imposed a protective order categorically barring all written discovery without making the findings required under CCP § 2017.020.

ii. The Argument on Writ

The argument in a writ challenging categorical denial of written discovery would be:

- LEGAL STANDARD: *Leake* holds the Civil Discovery Act applies to SVPA proceedings. Cheek confirms this and confirms that depositions are available. *Murillo* confirms the framework while adding a one-directional restriction on prosecution RFAs. Neither case holds that only depositions are available or that all written discovery is prohibited.
- ERROR: The trial court's categorical exclusion of all written discovery contradicts *Leake's* holding and misreads *Cheek*.
- DISCRETION: While courts have discretion under CCP § 2017.020 to limit specific discovery based on burden vs. benefit, categorical exclusion without case-specific analysis is not a proper exercise of discretion — it is legal error.
- PREJUDICE: The categorical exclusion denies respondent an opportunity to obtain information relevant to the only contested issue at trial — the mental disorder diagnosis and risk assessment — through the most efficient and targeted means (written discovery).

h. Strategic Use Of Written Discovery In SVP Cases

Even within the scope limitations, targeted written discovery can be highly effective in SVP defense. The following are practical applications:

i. Document Demands Under WIC § 6603(a) and CCP § 2031

WIC § 6603(a) provides a statutory right to all relevant medical and psychological records. A document demand targeting the complete records reviewed by the evaluator — including raw assessment data, prior evaluation reports, hospital treatment records reviewed, and actuarial scoring worksheets — is squarely within both the statutory right and the two-issue scope limitation.

Strategic document demands should specifically target:

- The complete administrative file underlying the current SVP evaluation.
- All prior SVP evaluation reports involving the same respondent (including any evaluations that concluded the respondent did not meet SVP criteria).
- Raw data and scoring worksheets from any assessment instruments administered (ABEL, AASI-3, PPG, Static-99R, RRASOR, STABLE-2007).
- The evaluator's written notes and drafts from the evaluation interview.
- Correspondence between evaluators and the DSH regarding the evaluation.

ii. Interrogatories Targeting Methodology

Interrogatories asking the evaluator to identify the specific DSM-5-TR criteria satisfied, the data that forms the basis for the risk level conclusion, and all literature relied upon are directly relevant to Issue 2 and are within the permissible scope. These interrogatories can expose methodological weaknesses before deposition.

iii. Requests for Admissions — Locking Down Foundational Facts (Respondent's Use Unaffected by *Murillo*)

Murillo v. Superior Court (2006) 143 Cal.App.4th 730 prohibits the prosecution from propounding RFAs that would eliminate the state's burden of proof on ultimate SVPA issues. It does not prohibit the respondent from using RFAs. Respondent-propounded RFAs targeting foundational and methodological facts are squarely available and highly effective:

- Whether the evaluator administered a specific assessment instrument (ABEL, AASI-3, PPG, Static-99R, STABLE-2007).
- Whether the evaluator reviewed specific identified records before completing the evaluation.
- Whether the evaluator is aware of specific published peer-reviewed studies critical of the diagnostic methodology used.
- Whether specific raw data from assessment instruments reflects particular numeric scores or findings.
- Whether prior evaluations of the same respondent by the same evaluator reached different diagnostic conclusions.

These admissions establish foundational facts that can be used at trial under Evidence Code § 2033.410 and cannot be contradicted by the evaluator once admitted. They do not eliminate the state's burden — they narrow evidentiary disputes about the methodology underlying the diagnosis.

CAUTION: Defense counsel should be aware that if the respondent propounds RFAs and the People deny them without a reasonable basis, cost-of-proof sanctions under CCP § 2033.420 become available after trial. This is a sword that cuts both ways and should factor into tactical decisions about which requests to propound.

iv. Using Written Discovery to Prepare for Evaluator Deposition

Even if the court limits written discovery, document demands and interrogatories served before the evaluator's deposition allow defense counsel to review the actual records before the deposition occurs — rather than seeing them for the first time in the deposition room. This is especially important for ABEL/AASI-3 and PPG raw data, which evaluators often do not include in their reports but which can contradict their diagnoses.

i. Quick Reference Summary

Question	Answer
Does the Civil Discovery Act apply to SVPA cases?	YES — *Leake* (2001); *Cheek* (2001). SVPA proceedings are civil special proceedings under *Hubbart v. Superior Court* (1999).
Are depositions available?	YES — Confirmed by both *Leake* and *Cheek*.
Are interrogatories available?	Potentially YES — not categorically prohibited by any published case; subject to court discretion and scope limitation.
Are document demands available?	YES — WIC § 6603(a) independently provides right to all relevant medical and psychological records; document demands under CCP § 2031 also available subject to scope and discretion.
Can the prosecution propound RFAs to the respondent?	NO — *Murillo* (2006) prohibits this because it would unconstitutionally eliminate the state's burden to prove the case beyond a reasonable doubt.
Can the respondent propound RFAs to the People or evaluators?	YES — *Murillo's* prohibition runs one direction only (against the prosecution). Respondent's use of RFAs on foundational and methodological facts is not prohibited.
Is there a categorical rule prohibiting all written discovery?	NO — No published California appellate case holds this. Murillo prohibits prosecution RFAs only. *Cheek* confirmed depositions; it did not prohibit other forms.
Can a court limit written discovery?	YES — CCP § 2017.020 authorizes courts to limit discovery where burden outweighs benefit; courts have discretion based on the narrow SVPA scope.
What is the permissible scope?	Limited to the two trial issues: (1) qualifying conviction(s), and (2) mental disorder and likelihood of reoffense. WIC § 6600(a).
Is a categorical denial of all written discovery challengeable?	YES — by writ petition to the Court of Appeal, arguing legal error under *Leake*.
Key statutory provision for records access?	WIC § 6603(a) — respondent entitled to 'all relevant medical and psychological records and reports' independent of the Civil Discovery Act.

K. Evidentiary Procedures In A Probable Cause Hearing

One of the most consequential misunderstandings in SVPA practice is the assumption that the Probable Cause Hearing is a relaxed proceeding at which the state can present its case in any form it chooses and the judge may consider whatever the prosecutor places before the court. This assumption is wrong. The California Evidence Code applies at the PCH. Authentication requirements apply. The hearsay rules apply. Expert testimony on case-specific facts is subject to the same evidentiary framework that governs trial testimony. Defense counsel who do not know and enforce these rules allow the state to present constitutionally and statutorily defective evidence without objection — and the client pays the price.

a. The California Evidence Code Applies in Full at the Probable Cause Hearing

The foundational rule is stated plainly in Evidence Code section 300: "Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a court of appeal or superior court, including proceedings in such actions conducted by a referee, court commissioner, or similar officer." The SVPA does not contain any provision exempting SVP probable cause hearings from the requirements of the California Evidence Code. In the absence of such an exemption, the Evidence Code applies in full.

This is not a contested proposition. California appellate courts have confirmed it repeatedly. The Legislature, which has expressly exempted other civil commitment proceedings from evidence code requirements — notably proceedings under the Lanterman-Petris-Short Act, where Welfare and Institutions Code section 5256.4(b) creates an explicit evidence code exemption — created no such exemption for SVP probable cause hearings. Courts have held that when the Legislature knows how to create an evidentiary exemption and does not do so in a specific context, no exemption exists.

In re Parker (1998) 60 Cal.App.4th 1453

Background: Leon Parker's SVP probable cause hearing was conducted as a facial review of the petition and its attachments, without a full adversarial hearing. Parker's counsel objected that a full evidentiary hearing was required.

Holding: The Court of Appeal held that the SVP probable cause hearing under section 6602 requires more than a paper review of the petition. The hearing must be a full

adversarial proceeding, analogous to a criminal preliminary hearing, at which the respondent has the right to cross-examine witnesses and to contest the evidence presented by the state. The court held that the procedures required by the Act comport with the rules of evidence and due process, and that the full evidentiary hearing standard applies.

Defense Significance: *Parker* established the adversarial, evidentiary character of the SVPA PCH. It is the foundational case for the proposition that the PCH is not a paper proceeding and that evidence must be presented and tested in accordance with applicable rules.

In re Kirk (1999) 74 Cal.App.4th 1066

Background: At Kirk's SVP probable cause hearing, the People submitted uncertified copies of the psychological evaluations. The trial court relied on those evaluations in finding probable cause. Kirk sought habeas corpus relief, arguing that the certification requirements of Evidence Code sections 1530 and 1531 applied and had not been met.

Holding: The Court of Appeal granted the petition, holding unequivocally that "Evidence Code section 300 makes clear that the Evidence Code applies in all actions, '[e]xcept as otherwise provided by statute.'" The Legislature's failure to create any exemption from evidentiary rules for SVP probable cause hearings was fatal to the People's position. The court held that the certification requirements of Evidence Code sections 1530 and 1531 apply to SVP probable cause hearings, and that the trial court erred in relying on uncertified psychological evaluations. The probable cause finding was reversed.

Core Reasoning: The court noted that the Legislature had expressly exempted LPS commitment proceedings from evidence code compliance (WIC § 5256.4(b)), demonstrating legislative awareness of how to create such exemptions. The Legislature's silence in the SVPA context was not an oversight — it was a deliberate decision that the Evidence Code applies. "In light of the mandate of Evidence Code section 300, and the absence of an evidentiary exclusion in the SVP Act, we are constrained to conclude that the certification requirements of Evidence Code sections 1530 and 1531 apply to SVP probable cause hearings."

Defense Significance: *Kirk* is the definitive appellate authority for enforcement of the Evidence Code at the SVP PCH. Every evidentiary objection at the PCH — authentication, hearsay, foundation, secondary evidence — is grounded in the principle *Kirk* established: the Evidence Code applies, no exception has been created, and the state must comply.

The combined force of *Parker*, *Kirk*, and the California Supreme Court's subsequent decisions in the SVP context establishes a clear framework: the SVP probable cause

hearing is a full adversarial evidentiary proceeding to which the California Evidence Code applies without exception. The state must present admissible evidence. The respondent has the right to object to inadmissible evidence and to cross-examine witnesses. Courts that permit the state to present uncertified, unauthenticated, or otherwise inadmissible evidence at the PCH are permitting constitutional and statutory error.

b. Authentication and Foundation: Documents Must Be Properly Introduced Before the Evaluator Can Testify to Their Contents

The application of the Evidence Code to the SVP PCH has a specific and immediately practical consequence that most defense attorneys miss: the documents that the state's evaluator reviewed and relied upon in forming the opinions expressed in the evaluation — the criminal records, the prior psychological evaluations, the police reports, the hospital records, the prior conviction documents — must be authenticated and properly introduced into evidence before the evaluator can testify as to their contents as case-specific facts.

This rule derives from two intersecting principles. First, under Evidence Code sections 1400-1402, no writing may be received in evidence unless it is first authenticated. Authentication is the process of establishing that the document is what the proponent claims it to be. Second, under *People v. Sanchez* (2016) 63 Cal.4th 665, an expert witness cannot relate case-specific hearsay to the trier of fact as the basis for the expert's opinion unless those case-specific facts are either independently proved by competent evidence or covered by an applicable hearsay exception. The interaction of these two rules — authentication and the *Sanchez* case-specific hearsay framework — creates a demanding foundational requirement that the state must satisfy before the evaluator's testimony is admissible.

People v. Yates (2018) 25 Cal.App.5th 474

Background: At Yates's SVP trial, the People's expert witnesses testified to case-specific facts drawn from state hospital records, criminal records, and psychological evaluations spanning over 40 years. Before trial, Yates's counsel filed a motion in limine under *Sanchez* to preclude the experts from relating case-specific hearsay from documents that had not been admitted into evidence through an applicable hearsay exception.

Holding: The Court of Appeal applied the *Sanchez* framework directly to SVP expert testimony. Under *Sanchez*, an SVP expert may still rely on hearsay in forming an opinion, and may tell the trier of fact in general terms that the expert did so. But an expert may not relate case-specific facts from documents to the trier of fact as the basis

for the expert's opinion unless those documents have been independently proved by competent evidence or fall within an applicable hearsay exception. Case-specific facts from police reports, psychological records, hospital records, and other documents used by SVP evaluators are not background general knowledge — they are case-specific facts that the *Sanchez* rule directly governs.

Defense Significance: *Yates* establishes the *Sanchez* framework as governing SVP expert testimony. Before the evaluator can testify to the contents of any document — a police report describing a prior offense, a prior psychological evaluation's conclusions, a hospital record describing institutional behavior — that document must be properly before the court. If the document is not admitted into evidence through an applicable exception or the witness who authored it, the evaluator cannot tell the trier of fact what the document says. The trier of fact considers the case-specific content for its truth, and hearsay offered for its truth must satisfy the rules.

Bennett v. Superior Court (2019) 39 Cal.App.5th 862

Background: Joseph Bennett's SVP probable cause hearing was conducted using expert testimony from Dr. Korpi, who testified to case-specific facts drawn from two prior incidents — Bennett's 1986 predicate offense and an alleged 2012 rape for which Bennett had not been convicted. Counsel objected that the 2012 incident constituted inadmissible case-specific hearsay. The trial court overruled the objection, admitted the testimony "for the limited purpose of explaining Dr. Korpi's opinion," and found probable cause.

Holding: The Court of Appeal granted Bennett's writ petition and reversed the probable cause finding. Applying *Sanchez*, the court held that an SVP expert at the probable cause hearing cannot testify to case-specific facts drawn from documents that are not independently admitted into evidence or covered by an applicable hearsay exception. The trial court's limiting instruction — that the case-specific testimony was received only to explain the expert's opinion, not for its truth — was expressly rejected as a basis for admission. *Sanchez* had specifically overruled the prior doctrine that a limiting instruction could cure the hearsay problem with expert basis testimony.

The *Sanchez* Rule Stated for SVP PCH: An expert at a probable cause hearing "may still rely on hearsay in forming an opinion, and may tell [the court] in general terms that he did so." But the expert "may not relate as true [to the court] case-specific facts about which the expert has no independent knowledge" unless those facts are independently admitted into evidence or covered by an applicable hearsay exception. (*Sanchez*, *supra*, 63 Cal.4th at p. 686, applied through *Bennett*.)

Prejudice Standard: Because the inadmissible case-specific hearsay about the 2012 incident was "central to the trial court's finding of probable cause" — Dr. Korpi had testified he would have been reluctant to find the respondent met criteria based on the

1986 offense alone — the error was prejudicial, and the probable cause finding could not stand.

Defense Significance: *Bennett* is the most important evidentiary case in current SVP probable cause hearing practice. It directly establishes that the *Sanchez* rule applies at the SVP PCH, that limiting instructions do not cure the hearsay problem, and that a probable cause finding based on inadmissible case-specific hearsay will be reversed. Every PCH defense must include a pre-hearing motion in limine under *Sanchez* and *Bennett* to identify and exclude case-specific hearsay the state's evaluator intends to relate to the court.

Walker v. Superior Court (2021) 12 Cal.5th 177

Background: The California Supreme Court granted review to resolve a split of authority between *Bennett* (which held that case-specific hearsay in SVP evaluations regarding nonpredicate offenses was inadmissible at the PCH) and a subsequent Court of Appeal decision that held section 6602 created a broad implied hearsay exception allowing all hearsay in evaluations to be considered at the PCH.

Holding: The California Supreme Court sided with *Bennett*. The Court held that nothing in the SVPA — neither the statutory language, the legislative history, nor prior case law — creates a hearsay exception allowing the wholesale admission of evaluation reports containing hearsay regarding nonpredicate offenses at the SVP probable cause hearing. The Legislature created a narrow hearsay exception in WIC § 6600(a)(3) for documentary evidence of predicate offenses, but created no comparable exception for hearsay about nonpredicate offenses or other case-specific facts in expert evaluations. The Court reversed and remanded for a new probable cause hearing from which the inadmissible hearsay had been excluded.

The Rule *Walker* Establishes: At an SVP probable cause hearing, hearsay regarding nonpredicate offenses and case-specific facts not covered by the WIC § 6600(a)(3) exception or any other applicable hearsay exception is inadmissible — even when that hearsay is contained in a psychological evaluation attached to the SVP petition. There is no implied blanket hearsay exception for the content of SVP evaluations at the probable cause hearing.

Defense Significance: *Walker* is the California Supreme Court's definitive resolution of the hearsay question at the SVP PCH. It forecloses the argument that the SVP petition creates a statutory hearsay exception for evaluation content. It confirms that the Evidence Code's hearsay rules apply. And it directly supports the argument that a probable cause finding based on inadmissible hearsay is constitutionally and statutorily defective.

c. Practical Application: What Defense Counsel Must Do Before and During the PCH

1. File a *Sanchez / Bennett* Motion in Limine Before the Hearing

Before every SVP probable cause hearing, defense counsel must file a written motion in limine, grounded in *People v. Sanchez* (2016) 63 Cal.4th 665 and *Bennett v. Superior Court* (2019) 39 Cal.App.5th 862, identifying each category of case-specific hearsay the state's evaluator is expected to relate to the court and seeking exclusion of any such testimony regarding documents not independently admitted into evidence.

The motion should identify, document by document, each record the evaluator reviewed and referenced in the evaluation report, and separately categorize each document as either: (a) a document covered by an applicable hearsay exception and properly authenticated, (b) a document for which the People have not established admissibility, or (c) a document regarding nonpredicate offenses or uncharged conduct for which Walker specifically forecloses admission through the evaluator's testimony.

Documents in category (a) may be presented through the evaluator. Documents in categories (b) and (c) may not. The evaluator may tell the court in general terms that the evaluator reviewed categories of records — but may not relate the specific case-specific contents of inadmissible documents as the basis for the evaluator's opinion.

2. Object at the Hearing to Each Violation

Even where a pre-hearing motion in limine has been denied, defense counsel must make specific, contemporaneous objections at the hearing each time the evaluator attempts to relate case-specific hearsay from documents not in evidence. Failure to object forfeits the issue on any subsequent review. Each objection should specify the ground: "Objection, hearsay, no applicable exception; *People v. Sanchez* and *Bennett v. Superior Court* prohibit expert testimony to case-specific facts from unadmitted documents."

If the court overrules the objection and permits the testimony, defense counsel must make a specific motion to strike the testimony and move for a renewed finding of probable cause from which the inadmissible evidence has been excluded. If the court then finds probable cause based on evidence that includes the inadmissible testimony, the record is preserved for writ review. *Bennett* itself was decided on writ review after exactly this procedural sequence.

3. Authentication Objections: Every Document Must Be Laid In

Under *Kirk* and the Evidence Code, every document the People seek to have the court consider at the probable cause hearing must first be authenticated. A psychological evaluation report does not authenticate itself. The evaluator cannot simply walk into the hearing and begin testifying to the report's conclusions without the People first establishing that the report is what it purports to be — an evaluation prepared by a qualified DSH-designated evaluator, using proper evaluation protocol, and accurately reflecting the evaluator's findings.

Authentication of the evaluation report requires either: (1) the evaluator's own testimony at the hearing that the report is the evaluator's own report, accurately stating the evaluator's findings (which requires the evaluator to be called as a live witness and subjected to cross-examination); or (2) certification of the report under Evidence Code sections 1530 and 1531, which requires the report to bear the certification of an authorized public officer. An uncertified report submitted without live witness authentication is inadmissible under *Kirk*. Defense counsel must object to any uncertified evaluation report offered without the evaluator being called as a live witness.

4. The Authentication Requirement for Documents the Evaluator Reviewed

The authentication and foundation requirement extends beyond the evaluation report itself to every document the evaluator reviewed and intends to rely upon in testimony. Under *Yates* and *Sanchez*, before the evaluator can testify to the case-specific contents of a police report, a prior conviction record, a hospital discharge summary, a prior psychological evaluation, or any other document, that document must independently be established as admissible — either through proper authentication and a hearsay exception, or through the testimony of its author.

This means that the state must independently lay in each document the evaluator reviewed before the evaluator can relate its contents to the court as case-specific facts. The sequence is mandatory: first the document is authenticated and admitted; then the evaluator may testify to its contents. An evaluator who is allowed to testify to the contents of documents that have not been independently admitted has bypassed the authentication requirement and presented case-specific hearsay in violation of *Sanchez*, *Yates*, and Bennett.

Practice Point: Courts frequently permit state's evaluators to testify to the contents of unadmitted records without objection, because defense counsel is unaware of the authentication requirement. The result is a probable cause finding based on case-specific hearsay that *Bennett* and *Walker* say is inadmissible. Counsel who make timely authentication and *Sanchez* objections, and who preserve a full record of those objections, are positioned for successful writ review of the probable cause finding if the court overrules them.

d. The One Statutory Hearsay Exception: Predicate Offense Documentary Evidence Under WIC § 6600(a)(3)

Walker confirms that there is one statutory hearsay exception that does apply at the SVP PCH: Welfare and Institutions Code section 6600(a)(3), which permits the admission of documentary evidence to prove the existence and details of prior qualifying predicate offenses. The California Supreme Court recognized this exception in *People v. Otto* (2001) 26 Cal.4th 307, and it was carried forward through *Walker*.

But this exception is narrow. It applies to predicate offenses — the qualifying sexually violent offenses that establish the first criterion for SVP commitment. It does not apply to: nonpredicate prior offenses; uncharged allegations; arrests that did not result in qualifying convictions; records from the respondent's institutional history; prior psychological evaluation reports from prior cycles; or any other category of case-specific evidence the state's evaluator may wish to relate.

Defense counsel must understand the precise scope of the WIC § 6600(a)(3) exception so that the defense can object to any attempt by the People to extend it beyond its proper reach. The People routinely attempt to use the predicate offense exception as a general license to introduce any evaluation-related hearsay. *Walker* directly and expressly forecloses that interpretation.

e. Summary: The Evidentiary Framework Governing the SVP Probable Cause Hearing

The rules governing evidence at the SVP probable cause hearing can be stated as a series of firm propositions, each grounded in California statute or appellate authority.

Proposition 1: The California Evidence Code applies in full at the SVP probable cause hearing. (Evid. Code § 300; *In re Kirk* (1999) 74 Cal.App.4th 1066.) The Legislature created no exemption, and no exemption will be implied.

Proposition 2: The PCH is a full adversarial evidentiary hearing, not a paper proceeding. The respondent has the right to cross-examine the state's witnesses, present defense evidence, and require the state to comply with evidentiary rules. (*In re Parker* (1998) 60 Cal.App.4th 1453.)

Proposition 3: Every document the state intends to offer at the PCH must be authenticated before admission. Uncertified evaluation reports are not self-authenticating. (*In re Kirk*, supra; Evid. Code §§ 1400-1402, 1530-1531.)

Proposition 4: An SVP expert at the PCH may not relate case-specific hearsay from documents not independently admitted into evidence. General terms about the type of records reviewed are permissible; specific case-specific facts from

unadmitted documents are not. (*People v. Sanchez* (2016) 63 Cal.4th 665; *People v. Yates* (2018) 25 Cal.App.5th 474; *Bennett v. Superior Court* (2019) 39 Cal.App.5th 862.)

Proposition 5: There is no blanket implied hearsay exception for the content of psychological evaluation reports at the SVP PCH. The WIC § 6600(a)(3) exception applies only to predicate offense documentary evidence. Hearsay about nonpredicate offenses and other case-specific facts in evaluation reports is inadmissible. (*Walker v. Superior Court* (2021) 12 Cal.5th 177.)

Proposition 6: A limiting instruction does not cure the *Sanchez* problem. If the hearsay is inadmissible, it must be excluded; it may not be admitted with a limiting instruction. (*People v. Sanchez*, *supra; Bennett, supra*.)

Proposition 7: A probable cause finding based on inadmissible case-specific hearsay is prejudicial error where the inadmissible evidence was central to the finding. The finding will be reversed and a new hearing ordered. (*Bennett, supra*; *Walker, supra*.)

Defense counsel who knows and enforces these rules at every PCH holds an evidentiary framework that, when correctly applied, can foreclose large portions of the state's case — and can result in a reversal of a wrongly granted probable cause finding on writ review. The rules exist. The cases are clear. The question is whether the attorney appearing for the respondent is prepared to use them.

L. Hearsay Exceptions In SVPA Proceedings

Hearsay law in SVPA proceedings is one of the most actively litigated areas in California civil commitment practice, and it is the area where defense attorneys most frequently allow the People to present evidence that should never reach the court. The law in this area has shifted dramatically since 2016. Understanding exactly what hearsay is admissible, what is excluded, and what an evaluator may and may not present — and why — is no longer optional knowledge for defense counsel. It is foundational.

a. The Three Criteria for SVP Commitment and Why Each Matters to Hearsay Analysis

Before addressing what hearsay is and is not admissible, defense counsel must understand the structure of the SVP criteria, because the admissibility of every item of evidence depends on which criterion the People claim it supports.

Welfare and Institutions Code section 6600, subdivision (a)(1) defines a sexually violent predator as a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior. Three distinct criteria must be proven beyond a reasonable doubt at trial, and supported by probable cause at the probable cause hearing.

> **Criterion A — Prior Qualifying Conviction:** *The respondent has been convicted of a sexually violent offense against one or more victims. The qualifying offenses are enumerated exclusively in WIC § 6600(b). Only those specifically listed offenses, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury, constitute predicate offenses.*

> **Criterion B — Current Diagnosed Mental Disorder:** *The respondent has a diagnosed mental disorder — defined in WIC § 6600(c) as 'a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.' This is Criterion B: current diagnosed mental disorder.*

> **Criterion C — Likely to Reoffend Because of the Mental Disorder:** *The diagnosed mental disorder makes the person a danger in that it is likely he or she will engage in sexually violent criminal behavior. The California Supreme Court has held that the likelihood of reoffending must flow from the diagnosed mental disorder. (People v. Superior Court (Ghilotti) (2002) 27 Cal.4th 888, 920-921.) As Ghilotti observed, the requisite likelihood of reoffense 'is a separate determination which does not inevitably flow from one's history of violent sex offenses and a predisposing mental disorder.'*

The causal chain required by the statute is linear and each link is mandatory: a qualifying predicate conviction must exist (Criterion A); that conviction history must support a current diagnosable mental disorder (Criterion B); and that mental disorder must be the cause of the substantial danger of reoffending (Criterion C). Evidence that

does not advance at least one of these three criteria has no legitimate place in an SVP proceeding. And critically — as this subsection demonstrates — if Criterion B cannot be established with admissible evidence, Criterion C collapses entirely, because there is no mental disorder through which to route the likelihood of reoffending.

b. Welfare and Institutions Code Section 6600(a)(3) — The Sole Statutory Hearsay Exception and Its Precise Scope

The California Legislature created exactly one statutory hearsay exception applicable to SVPA proceedings. It appears in Welfare and Institutions Code section 6600, subdivision (a)(3), and it is the indispensable starting point for every hearsay analysis in an SVP case.

> **WIC § 6600(a)(3) — Statutory Text:** *"The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals."*

The California Supreme Court in *People v. Otto* (2001) 26 Cal.4th 200 held that this provision implicitly authorizes the admission of multiple-level hearsay — including victim statements contained in probation and presentence reports — to prove the details of a prior predicate offense. *Otto* explained that the Legislature created this exception specifically to relieve victims of the burden and trauma of testifying about the details of their victimization, and that the existence of a prior conviction provides inherent indicia of reliability for the hearsay statements used to establish the details of that conviction.

1. What the WIC § 6600(a)(3) Exception Permits

► Documentary evidence proving the existence of a prior qualifying conviction under WIC § 6600(b), including prison packets, abstracts of judgment, and certified conviction records.

► Documentary evidence establishing the details underlying the commission of a qualifying predicate offense — the specific facts of how the offense occurred, including the relationship between the respondent and the victim, and evidence that the relationship was predatory as defined in WIC § 6600(e).

► Multiple-level hearsay contained within those qualifying documentary records — including victim statements embedded in probation reports, police reports,

preliminary hearing transcripts, and sentencing reports — where those statements describe the facts of the predicate offense for which there was a conviction.

► Evaluations by the State Department of State Hospitals, to the extent those evaluations address and document the facts underlying qualifying predicate convictions.

2. The Critical Boundary: What WIC § 6600(a)(3) Does NOT Permit

The boundaries of the § 6600(a)(3) exception are as important as its permissions. The California Supreme Court in *Walker v. Superior Court* (2021) 12 Cal.5th 177 and the Court of Appeal in *People v. Superior Court* (*Couthren*) (2019) 41 Cal.App.5th 1001 have each independently confirmed the following exclusions:

► The exception does NOT extend to offenses not listed under WIC § 6600(b). If an offense is not one of the enumerated sexually violent offenses — committed by force, violence, duress, menace, or fear of immediate bodily injury — it is not a qualifying predicate offense, and the § 6600(a)(3) exception does not apply to documentary evidence about it.

► The exception does NOT cover uncharged conduct, arrests without conviction, or allegations that did not result in a qualifying conviction. The statutory text expressly limits the exception to 'an offense that led to a prior conviction.' Where there was no conviction — or where the conviction is not a qualifying offense under § 6600(b) — the exception does not apply.

► The exception does NOT extend to institutional behavior records, state hospital records, prison rule violation reports, or any other evidence about the respondent's conduct after the predicate offenses. *People v. Burroughs* (2016) 6 Cal.App.5th 378, 408 held explicitly that expert testimony relying on hearsay details about 'appellant's behavior while in state custody' was inadmissible case-specific hearsay because the § 6600(a)(3) exception is limited to qualifying predicate convictions and their details.

► The exception does NOT create a general license for evaluators to include in their reports any category of hearsay simply because it was reviewed. The exception is offense-specific and conviction-specific.

⚠ **Key Rule:** Section 6600(a)(3) creates a hearsay exception only for documentary evidence proving and detailing qualifying predicate convictions under § 6600(b). Every other category of hearsay in an SVP proceeding must independently satisfy a separate hearsay exception or be presented through a live witness with personal knowledge.

c. People v. Sanchez (2016) 63 Cal.4th 665 — The End of Expert Hearsay Conduits

People v. Sanchez (2016) 63 Cal.4th 665

Holding: An expert witness may not relate as true, to the trier of fact, case-specific out-of-court statements unless those statements are independently proven by competent evidence or are covered by an applicable hearsay exception. The prior doctrine allowing experts to relate case-specific hearsay as the "basis" of their opinion — with a limiting instruction that the jury could consider it only to evaluate the opinion and not for its truth — was overruled. When an expert treats case-specific facts as true and incorporates them into an opinion, those facts are being offered for their truth, and hearsay rules apply.

The *Sanchez* rule fundamentally changed the legal landscape for expert testimony in every California civil and criminal proceeding, including SVP proceedings. Before *Sanchez*, evaluators routinely testified to extensive case-specific facts — the details of uncharged offenses, the content of police reports about incidents for which the respondent was never convicted, the substance of institutional records — while courts admitted that testimony under the fiction that it was offered only to explain the expert's opinion, not for its truth. *Sanchez* eliminated that fiction.

The Court in *Sanchez* drew a critical distinction between two categories of expert knowledge:

► **Permissible — General Background Knowledge:** An expert may rely on, and may testify to, general background information accepted in the field of expertise — research, statistical studies, professional literature, and established principles of forensic psychology or actuarial risk assessment. This is not case-specific hearsay; it is the kind of general knowledge that experts are qualified to apply. An SVP evaluator may testify, for example, to the general research basis for Static-99R, the peer-reviewed literature on recidivism rates, or the diagnostic criteria in the DSM-5. None of that is case-specific.

► **Prohibited — Case-Specific Hearsay Treated as True:** An expert may not relate, as true, case-specific facts about the respondent that the expert learned from hearsay sources, unless those facts are independently proven by admissible evidence or fall within a recognized hearsay exception. The evaluator who says 'According to the 1994 police report, the respondent forced himself on a twelve-year-old victim in a park' is relating case-specific hearsay. That statement is offered so the court treats it as true — and therefore it must clear the hearsay rules.

Sanchez was decided in the context of a criminal gang case, but the California courts moved swiftly to confirm its application to SVP proceedings. *People v. Burroughs* (2016) 6 Cal.App.5th 378, decided only months after *Sanchez*, was the first published appellate court decision applying *Sanchez* in an SVP case. The *Burroughs* court stated expressly: "[A]dmission of expert testimony in civil cases as well [is governed by *Sanchez*], and nothing in *Sanchez* indicates that the Court intended to restrict its holdings regarding hearsay evidence to criminal cases." (*Burroughs*, *supra*, 6 Cal.App.5th at p. 395.) *People v. Roa* (2017) 11 Cal.App.5th 428 and *Walker v. Superior Court* (2021) 12 Cal.5th 177 each confirmed that *Sanchez* applies fully to SVP proceedings.

The practical consequence is decisive. Under *Sanchez*, an SVP evaluator at the probable cause hearing or at trial may still:

- ► Tell the court or jury in general terms that the evaluator reviewed categories of documentary records — police reports, probation reports, hospital records, prior evaluations — as part of the evaluation.
- ► Testify to the expert's diagnostic conclusion and the general professional basis for that methodology.
- ► Relate case-specific facts that are independently proven by admissible evidence — for example, the facts of a qualifying predicate offense that are established through properly admitted documentary evidence under the § 6600(a)(3) exception.

But under *Sanchez*, an SVP evaluator may NOT:

- ► Relate the specific contents of police reports about uncharged offenses as case-specific facts the court should treat as true.
- ► Testify to the specific behavioral details from institutional records or hospital records that have not been independently admitted into evidence through an applicable hearsay exception.
- ► Relate the content of reports prepared by non-testifying experts, prior evaluators, or treatment staff as case-specific facts. (*Burroughs* confirmed that experts cannot testify to the contents of reports prepared by other experts.)
- ► Describe the details of a victim's allegations in a case that did not result in a qualifying conviction, even if those allegations appear in a probation report or investigative file.

d. Case-by-Case Analysis: What Each Governing Decision Established

People v. Otto (2001) 26 Cal.4th 200

Core Rule Established: Section 6600(a)(3) is a statutory hearsay exception that allows multiple-level hearsay — including victim statements embedded in probation reports — to prove the details of a qualifying predicate conviction. The existence of a prior conviction is the most critical factor establishing reliability of the victim hearsay statements used to describe that conviction.

Scope of the Exception: The exception applies to 'the details underlying the commission of an offense that led to a prior conviction.' It is predicate-offense-specific. *Otto* did not authorize admission of hearsay about other conduct, uncharged offenses, or institutional history. *Otto* established the floor for what can be admitted; *Sanchez*, *Burroughs*, and *Walker* established the ceiling.

What *Otto* Did NOT Authorize: *Otto* did not hold that any hearsay an evaluator reviews may be related to the court. *Otto* addressed hearsay in presentence reports about the specific qualifying offenses. Prosecutors who attempt to extend *Otto* to justify admission of any documentary evidence reviewed by the evaluator are misreading the case.

People v. Burroughs (2016) 6 Cal.App.5th 378

Facts: At Burroughs's SVP trial, the People's experts relied on police reports, probation reports, mental health records, and institutional behavior reports. The challenged hearsay fell into two categories: (1) details about uncharged offenses Burroughs allegedly committed in addition to his two qualifying predicate offenses, and (2) details about his behavior while in state custody. The trial court admitted the testimony, reasoning it was offered for the non-hearsay purpose of explaining the experts' opinions.

Held — Post-*Sanchez*: Applying *Sanchez*, the Court of Appeal reversed. The admission of expert testimony relating case-specific hearsay about uncharged offenses and institutional behavior was error. The § 6600(a)(3) exception did not cover this material because it was not documentary evidence of a qualifying predicate conviction or the details underlying such a conviction. The "non-hearsay purpose" rationale that had justified this testimony before *Sanchez* was squarely overruled.

***Burroughs* on WIC § 6600(a)(3):** *Burroughs* confirmed that the § 6600(a)(3) hearsay exception does not apply to uncharged acts or non-qualifying prior convictions. The exception is limited to proving qualifying prior convictions and the details of how those specific qualifying offenses were committed.

Prejudice: The error was not harmless. The expert testimony about uncharged offenses was 'exceedingly inflammatory,' depicting the respondent as someone with an irrepressible propensity to commit sexual offenses. There was a reasonable probability the jury would have returned a more favorable verdict absent the inadmissible hearsay.

People v. Roa (2017) 11 Cal.App.5th 428

Facts: At *Roa's* SVP trial, the expert witnesses testified about case-specific facts drawn from probation officers' reports and police reports that had not been independently admitted into evidence. Defense counsel had filed motions in limine seeking to limit testimony about unadmitted hearsay, which the trial court denied.

Held: The trial court committed prejudicial error by allowing the experts to recite case-specific facts from police and probation reports that were not independently proven by admissible evidence. Where the facts underlying qualifying predicate offenses were independently proven by documentary evidence admitted under § 6600(a)(3) — including preliminary hearing transcripts and probation/sentencing reports about those specific qualifying offenses — the experts were permitted to relate those facts as the basis for their opinions. But the experts exceeded the scope of that permission by relating case-specific hearsay from other sources that had not been independently admitted.

The *Roa* Synthesis: *Roa* provides the clearest synthesis of the post-*Sanchez* SVP evidentiary framework: experts may relate case-specific facts only when those facts have been independently proven by admissible evidence through the § 6600(a)(3) exception or another applicable hearsay exception. Where facts have not been independently proven, the expert may acknowledge reviewing certain categories of records in general terms, but may not relate the specific contents as true.

Expert Testimony Still Permitted — With Proper Foundation: *Roa* confirmed that expert testimony is critical in SVP proceedings. SVP experts may still testify to their diagnoses and risk assessments. But the evidentiary building blocks those opinions rest on — case-specific facts about the respondent — must themselves be admitted through proper channels. Expert opinion cannot be used to bootstrap otherwise inadmissible hearsay into the proceeding.

Bennett v. Superior Court (2019) 39 Cal.App.5th 862

Facts: At Bennett's SVP probable cause hearing, the People's expert testified extensively about the details of a 2012 rape allegation against Bennett — an incident for which Bennett was never convicted, and which was therefore not a qualifying predicate

offense. The trial court admitted the testimony with a limiting instruction that it was received only to explain the expert's opinion, not for its truth.

Held: The Court of Appeal reversed. Applying *Sanchez*, the court held that the limiting instruction did not cure the hearsay problem. When an expert treats case-specific facts as true in forming an opinion and relates those facts to the court, those facts are offered for their truth — and a limiting instruction cannot change that. The § 6600(a)(3) exception did not apply because the 2012 incident was not a qualifying predicate conviction.

Prejudice — Central to Probable Cause Finding: The error was prejudicial because the expert testified he would have been reluctant to find the respondent met SVP criteria based on the qualifying predicate offense alone. The non-qualifying offense was central to the probable cause finding. Once that inadmissible evidence was removed, the evidentiary basis for probable cause was materially undermined.

***Bennett's* Lesson for PCH Practice:** Non-qualifying offenses — including uncharged allegations, arrests without qualifying convictions, and conduct covered by plea deals to non-qualifying charges — have no admissible evidentiary role at the probable cause hearing through expert testimony. Defense counsel must identify every non-qualifying offense the evaluator discusses and move to exclude it.

People v. Superior Court (Couthren) (2019) 41 Cal.App.5th 1001

Facts: *Couthren* was a companion case to *Bennett*, decided the same year. The evaluators' reports in *Couthren* relied extensively on hearsay regarding non-qualifying offenses. At the probable cause hearing, the prosecution sought to admit the evaluation reports wholesale.

Held: The Court of Appeal held that the trial court did not err in sustaining hearsay objections to the evaluations' case-specific content about non-predicate offenses. *Couthren* confirmed that *Sanchez* applies at SVP probable cause hearings, and that hearsay regarding non-predicate offenses in psychological evaluation reports is inadmissible.

On the Evaluator's Report Itself: *Couthren* acknowledged that SVP evaluations are typically comprehensive documents drawing on many sources — 'probation and police reports, investigative reports from prosecuting agencies, court records and transcripts, face-to-face interviews with the SVP defendant, prison and hospital rule violation reports, records of arrests, convictions and juvenile dispositions, and hospital records, including staff treatment notes, medication reports, and attendance records.' The court did not require evaluators to stop reviewing these materials. What the court required is that the case-specific facts from those materials not be related as true at the PCH without proper foundation.

Walker v. Superior Court (2021) 12 Cal.5th 177

Facts and Posture: The California Supreme Court granted review to resolve the split of authority created after *Bennett* and *Couthren*. The question was whether the SVPA creates a broad implied hearsay exception allowing courts reviewing SVP petitions to consider any hearsay contained in evaluation reports at the probable cause hearing.

Supreme Court's Definitive Holding: The California Supreme Court held that WIC § 6602(a) does not create any hearsay exception permitting hearsay about non-predicate offenses to be admitted through psychological evaluation reports at the SVP probable cause hearing. The only statutory hearsay exception the Legislature created is § 6600(a)(3), which is limited to predicate offense documentary evidence.

The Legislature Knew How to Create Exceptions: The Court observed that when the Legislature wanted to create a hearsay exception in the SVPA, it knew exactly how to do so — as evidenced by § 6600(a)(3) itself. The Legislature's silence regarding non-predicate hearsay was not an oversight. It reflected a deliberate judgment that only the narrow § 6600(a)(3) exception would apply.

Walker as the Capstone Authority: *Walker* is the definitive, highest-level authority on SVPA hearsay. It controls at every level of California courts. Any trial court ruling that admits hearsay about non-predicate offenses through evaluation reports at the probable cause hearing — after *Walker* — is committing reversible error.

e. What Evaluators May and May Not Include — And What the Defense Can Do About It

1. Permissible Report Content

An SVP evaluator may review and include in a report the following categories of information:

- ► The details of qualifying predicate convictions under WIC § 6600(b) — drawn from the documentary evidence enumerated in § 6600(a)(3), including preliminary hearing and trial transcripts, probation and sentencing reports, and DSH evaluations. The evaluator may relate these facts as the basis for opinions, provided the underlying documents are independently admitted.
- ► Actuarial risk assessment instrument scores — Static-99R, Stable-2007, and other validated instruments — including the specific item scores and the evaluator's justification for each item, provided those items are scored based on the evaluator's own review of properly admitted records.
- ► Diagnostic analysis applying DSM-5-TR criteria to the respondent's identified behavioral history, where the behavioral facts supporting each diagnostic criterion are drawn from admissible evidence.

► General professional background, methodology, and the published research basis for opinions on risk assessment and mental disorder diagnosis.

2. Non-Qualifying Offense Information and the Mental Disorder Nexus

This is the most nuanced and litigated area of SVP hearsay law, and the most important for defense counsel to understand precisely.

The general rule is that information about offenses not listed in WIC § 6600(b) has no admissible evidentiary basis in an SVP proceeding under the § 6600(a)(3) exception. *Burroughs, Bennett*, *Couthren*, and Walker all confirm this. However, the question arises whether evidence of a non-qualifying offense may be used not to prove Criterion A, but to support Criterion B — the current diagnosed mental disorder.

The answer requires careful analysis of the specific facts. The § 6600(a)(3) hearsay exception is tied to 'the details underlying the commission of an offense that led to a prior conviction.' This language links the exception to the qualifying predicate offense. But a diagnosable mental disorder is a clinical finding, and clinicians are trained to consider behavioral history in making diagnoses. The question is what evidentiary vehicle exists to place non-qualifying conduct before the court as support for a mental disorder diagnosis.

An illustrative example helps define the boundary: Consider a respondent with one qualifying Penal Code section 288(a) conviction and also a prior conviction for attempted lewd acts with a child under 14. The attempted lewd act conviction is not a qualifying offense under WIC § 6600(b) because it was not committed with force, violence, duress, menace, or fear of immediate bodily injury. However, if the victim of the attempted lewd act was prepubescent — proven by admissible evidence — the details of that offense may be clinically relevant to a diagnosis of pedophilic disorder under the DSM-5-TR, which requires a pattern of sexual attraction to prepubescent children. The diagnostic significance is not in the conviction's status as a qualifying offense; it is in what the conduct reveals about the respondent's sexual interest pattern.

However — and this is critical — the evaluator cannot simply relate the case-specific details of the non-qualifying offense from hearsay sources as the basis for the diagnosis. To use those facts, the prosecution must independently prove them by competent evidence. If the victim's prepubescent status can be proven through admissible evidence — testimony from the victim, medical records properly introduced, or criminal court records that are independently admissible — then the evaluator may incorporate those proven facts into a clinical opinion about the mental disorder.

What the evaluator cannot do is read from the police report about the attempted offense and say to the court: 'Based on the report, the victim was eight years old, and this

supports my diagnosis of pedophilic disorder.' That is case-specific hearsay from a document about a non-qualifying offense. It is outside the § 6600(a)(3) exception and is inadmissible under *Sanchez* unless the document is independently admitted through a hearsay exception or the facts are independently proven.

⚠ **Critical Distinction:** Evidence about a non-qualifying offense may potentially support Criterion B (mental disorder diagnosis) if the underlying facts are independently proven by competent, admissible evidence. But the non-qualifying offense's status as non-qualifying under § 6600(b) means it cannot be smuggled in through hearsay — the facts must be established through admissible means before the evaluator can incorporate them into a clinical opinion.

3. Impermissible Report Content — What Must Be Challenged

Based on the governing authorities, defense counsel must identify and challenge each of the following categories where they appear in an evaluation report:

- ► Details of uncharged conduct or non-qualifying convictions, drawn from police reports, probation reports, or investigative files, where those details are presented as case-specific facts the court should treat as true. (*Burroughs*; *Sanchez*.)
- ► Details about the respondent's institutional behavior — rule violations, treatment non-compliance, behavioral incidents in custody — drawn from institutional records that have not been independently admitted through an applicable hearsay exception. (*Burroughs*.)
- ► The contents of prior evaluation reports prepared by non-testifying evaluators, related as case-specific facts. (*Burroughs*; *Sanchez*.)
- ► Allegations from arrests that did not result in any conviction, or allegations that resulted in a conviction for a non-qualifying offense, used to establish the existence of conduct supporting either Criterion A or Criterion B, without independent evidentiary foundation.
- ► Hearsay statements from treatment records, staff notes, or hospital progress notes, where those statements describe case-specific conduct or statements by the respondent and are offered for their truth.

f. The People's Attempt to Cure Hearsay Problems Through Live Witnesses — And the Limits of That Approach

After *Bennett*, *Couthren*, and *Walker* established that hearsay about non-qualifying offenses is inadmissible through evaluation reports and expert testimony, prosecutors began calling live witnesses to present the same underlying facts directly. This is a legitimate procedural response — if a percipient witness testifies from personal knowledge, their testimony is not hearsay. But this approach has firm limits that defense counsel must enforce.

1. What Live Witnesses Can Legitimately Establish

A live witness with personal knowledge may testify about the facts of a qualifying predicate offense — including the nature of the offense, the victim's characteristics, and any details that bear on whether the offense was sexually violent and predatory. A victim of a qualifying predicate offense may testify. A detective who personally investigated a qualifying offense may testify based on personal knowledge. A probation officer who personally interviewed a victim and has personal knowledge of the facts may testify about what the officer directly observed or was told in a manner that qualifies under a hearsay exception.

Live witnesses may also testify to facts that support the mental disorder diagnosis, provided those facts are within the witness's personal knowledge and are relevant to Criterion B. A treatment professional who personally observed the respondent's behavior and personally formed clinical impressions may testify about those observations — that is personal knowledge, not hearsay.

2. The Relevance Ceiling — Non-Qualifying Offenses and the Criterion B Prerequisite

Here the statutory structure of the SVPA imposes a critical limit that prosecutors frequently attempt to circumvent, and that defense attorneys frequently fail to enforce.

Some prosecutors call live witnesses to testify about conduct that does not constitute a qualifying offense under WIC § 6600(b), arguing that the testimony goes to Criterion C — the likelihood of reoffending. The argument is that even if an offense is not a qualifying predicate offense for purposes of commitment, evidence of it is relevant to show that the respondent is likely to engage in sexually violent conduct in the future.

This argument has a fundamental structural flaw. WIC § 6600(a)(1) defines what must be proven: the respondent must have a diagnosed mental disorder that makes the person a danger in that it is likely he or she will engage in sexually violent criminal behavior. The word 'that' in 'in that it is likely' establishes the causal nexus required by

the statute: the likelihood of reoffending must flow from the mental disorder. Criterion C is not an independent element; it is the consequence of Criterion B. If Criterion B — the current diagnosed mental disorder — cannot be established with admissible evidence, Criterion C has no foundation on which to rest.

People v. Superior Court (*Ghilotti*) (2002) 27 Cal.4th 888 makes this structural relationship explicit: 'the requisite likelihood of reoffense is a separate determination which does not inevitably flow from one's history of violent sex offenses and a predisposing mental disorder.' *Ghilotti* was addressing a different issue — the sufficiency standard for the likely-to-reoffend determination — but its language confirms the dependency relationship: the likelihood determination flows from the mental disorder, and the mental disorder is the predicate for the likelihood analysis.

The practical consequence is this: evidence offered solely to show that the respondent is likely to reoffend, without any connection to establishing or supporting the mental disorder diagnosis, is not independently admissible. The SVPA does not contemplate commitment of a person whose criminal history makes reoffense likely in the abstract; it contemplates commitment of a person whose mental disorder makes reoffense likely. Every piece of evidence the prosecution offers at a PCH or trial must connect to one of the three criteria. Evidence that connects only to "likelihood of reoffending" without linking to a specific diagnosed mental disorder is evidence in search of a criterion it cannot independently satisfy.

⚠ **Defense Argument:** When a prosecutor offers live witness testimony about a non-qualifying offense and argues it goes to "Criterion C — likelihood of reoffending," the correct defense response is a relevance objection under Evidence Code section 350, combined with the following argument: Criterion C is the consequence of Criterion B. Likelihood of reoffending, under WIC § 6600(a)(1), is the danger arising from the mental disorder. Evidence about a non-qualifying offense does not establish the mental disorder required by Criterion B. Without an established mental disorder, Criterion C has no statutory predicate. The testimony is irrelevant to any independent element of SVP commitment and should be excluded.

3. Live Witnesses Must Still Testify About Relevant, Qualifying Conduct

Even where a live witness is called to bypass hearsay objections, the subject matter of that testimony must still be relevant to at least one of the three SVP criteria. A live witness testifying about a non-qualifying offense that has no bearing on the mental disorder diagnosis and is offered only as general bad-character or dangerousness evidence has nothing admissible to contribute to the proceeding. The relevance

requirement of Evidence Code section 350 applies to live testimony just as it applies to documentary evidence.

Defense counsel should be prepared to object to live witness testimony that: (a) concerns only non-qualifying offenses with no articulated connection to the specific mental disorder diagnosis; (b) goes to general dangerousness or criminal history without connecting to any element of the SVP criteria; or (c) is offered under the guise of "likelihood of reoffending" testimony when no qualifying mental disorder has yet been established with admissible evidence.

g. Synthesis: The Complete Hearsay Admissibility Framework for SVP Proceedings

The governing case law, properly synthesized, produces the following framework that defense counsel must apply at every stage of an SVP proceeding.

What CAN Be in an Evaluator's Report and Presented at Hearing

✓ The existence of qualifying predicate convictions under WIC § 6600(b), proven by documentary evidence through the § 6600(a)(3) exception. (*Otto*; *Roa*.)

✓ The details of how qualifying predicate offenses were committed, including victim statements in probation and sentencing reports related to those specific qualifying offenses, proven through the § 6600(a)(3) exception. (*Otto*; *Roa*.)

✓ The predatory nature of the qualifying offense — i.e., whether the victim was a stranger, casual acquaintance, or person cultivated for the purpose of victimization — proven through the § 6600(a)(3) exception. (WIC § 6600(e); *Otto*.)

✓ Expert diagnostic opinions based on DSM-5 criteria, where the behavioral evidence underlying each criterion is drawn from independently admitted, admissible evidence. (*Sanchez*; *Burroughs*; *Roa*.)

✓ General professional methodology and research — the non-case-specific basis for actuarial instruments and diagnostic methodology. (*Sanchez*.)

✓ Facts about non-qualifying offenses that are independently proven by competent, admissible evidence, where those facts have direct clinical relevance to the specific mental disorder diagnosis alleged. (*Sanchez* framework.)

What CANNOT Be in an Evaluator's Report and Presented at Hearing

✗ Details of uncharged offenses or non-qualifying convictions, related as case-specific hearsay through evaluation reports or expert testimony, without independent evidentiary foundation. (*Burroughs*; *Bennett*; *Couthren*; *Walker*.)

✗ Institutional behavior records, state hospital records, and custody incident reports, related as case-specific hearsay without independent admission through an applicable hearsay exception. (*Burroughs*.)

✗ The contents of reports prepared by non-testifying evaluators, prior evaluators, or treatment staff, related as case-specific facts. (*Burroughs*; *Sanchez*.)

✗ Hearsay about non-predicate offenses through evaluation reports, regardless of how those reports are formatted or attached to the SVP petition. (*Walker*.)

✗ Expert testimony relating case-specific hearsay as the basis for opinions, where the underlying case-specific facts have not been independently admitted. (*Sanchez*; *Burroughs*; *Roa*.)

✗ Limiting-instruction workarounds — the admission of otherwise-inadmissible case-specific hearsay with an instruction that it is received only to explain the expert's opinion and not for its truth. *Sanchez* overruled this doctrine. (*Sanchez*; *Bennett*.)

h. Practical Steps for Defense Counsel at Every Stage

● **Before the PCH:** Obtain and review the evaluation reports immediately upon appointment. Categorize every case-specific fact in each report as: (a) supported by an admissible documentary record of a qualifying predicate offense; (b) drawn from a non-qualifying offense or non-predicate source; or (c) from institutional or hospital records. Prepare a written chart mapping each evaluator's case-specific claims to their evidentiary source.

● **Motion in Limine:** File a written motion in limine before the probable cause hearing, identifying by page and paragraph each category of inadmissible hearsay in the evaluation reports and requesting exclusion under *Sanchez*, *Burroughs*, *Bennett*, *Couthren*, and *Walker*. The motion should attach the relevant evaluation report pages and the specific hearsay statements challenged.

● **At the PCH — Objections:** Object specifically to each violation as it occurs: 'Objection. Case-specific hearsay. No applicable hearsay exception. *People v. Sanchez* (2016) 63 Cal.4th 665 and *People v. Burroughs* (2016) 6 Cal.App.5th 378 prohibit expert testimony relating as true the case-specific contents of documents not independently admitted into evidence.' State the ground and the authority. Preserve the record.

● **Live Witness Testimony — Relevance Objections:** When the prosecution calls live witnesses to testify about non-qualifying offenses and argues the testimony goes to

likelihood of reoffending, object under Evidence Code section 350: 'Objection. Irrelevant. Under WIC § 6600(a)(1), likelihood of reoffending must flow from the diagnosed mental disorder. Testimony about a non-qualifying offense that does not support the specific mental disorder alleged in Criterion B is irrelevant to any element of SVP commitment.' Follow the argument with a reference to the statutory causal nexus and *Ghilotti*'s statement that likelihood of reoffense does not inevitably flow from criminal history alone.

- **Post-PCH Review:** If probable cause is found, immediately analyze whether the court relied on inadmissible hearsay that was central to the probable cause determination. *Bennett* and *Walker* authorize writ review of probable cause findings tainted by improperly admitted case-specific hearsay. File promptly.

The hearsay rules in SVP proceedings are not technicalities to be argued on appeal after conviction. They are the evidentiary framework within which the most serious deprivation of liberty in California's civil law system must operate. Every item of inadmissible evidence the prosecution presents without objection is an item the court or jury uses to justify commitment — and it is an item that should never have been considered. Defense counsel who know these rules, who prepare to enforce them, and who maintain the discipline to enforce them at every hearing fulfill the constitutional obligation that the system demands.

M. Motion In Limine For Probable Cause — Challenging The Different Mental Disorder Diagnosis

When the People's case for SVP commitment rests on a diagnosis of pedophilic disorder, the most consequential evidentiary work a defense attorney can do occurs before the probable cause hearing begins. The diagnosis of pedophilic disorder under the DSM-5-TR requires, as its clinical foundation, that the respondent's sexual attraction was directed at prepubescent children. That word — prepubescent — is a physical developmental status, not an age category. Evaluators who diagnose pedophilic disorder based on a victim's chronological age, without any record of the victim's actual physical development, are not applying the DSM-5-TR. They are guessing. And under California evidence law, expert opinions founded on guesswork are inadmissible. This subsection provides the legal framework and a complete Motion in Limine to enforce that rule at the probable cause stage.

a. The DSM-5-TR Definition of Pedophilic Disorder: Why Physical Development Is the Diagnostic Keystone

The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR), published by the American Psychiatric Association in 2022, sets the diagnostic standard for pedophilic disorder in SVPA proceedings. The DSM-5-TR's Criterion A for pedophilic disorder is unambiguous:

> **DSM-5-TR Criterion A — Pedophilic Disorder:** *"Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger)."*

The DSM-5-TR further states: 'The diagnostic criteria for pedophilic disorder are intended to apply both to individuals who freely disclose this paraphilia and to individuals who deny any sexual attraction to prepubertal children (generally age 13 years or younger), despite substantial objective evidence to the contrary.' (DSM-5-TR, p. 792.)

The operative word in this definition is prepubescent. This is not synonymous with young, minor, child, or any chronological age category. Prepubescent is a term of medical art describing a specific physical developmental status: the stage before the onset of puberty, characterized by the complete absence of secondary sexual characteristics. Under the gold-standard classification system for pubertal development — the Tanner Scale — a prepubescent child is one who remains at Tanner Stage 1. Any child who has entered Tanner Stage 2 or beyond has begun puberty and is, by clinical definition, no longer prepubescent.

The DSM-5-TR's age reference of 'generally age 13 years or younger' is explicitly qualified by the word 'generally.' It is not a definition. It is a rough approximation that explicitly acknowledges individual variation. This acknowledgment reflects a clinical reality that the published pediatric literature has documented exhaustively: children enter puberty across a wide age range, and chronological age is an unreliable proxy for pubertal status. A nine-year-old girl may already be in Tanner Stage 2. An eleven-year-old boy may remain in Tanner Stage 1. Age alone tells the clinician nothing about developmental stage.

The DSM-5-TR also draws a clear distinction between pedophilic disorder — which requires sexual attraction to prepubescent children — and hebephilia, which refers to sexual attraction to pubescent children (Tanner Stages 2 and 3, typically ages 11–14). Critically, hebephilia is NOT a recognized diagnostic category in the DSM-5-TR. It was proposed for inclusion during the DSM-5 revision process and was expressly rejected.

(See Medscape, Paraphilic Disorders Overview, citing DSM-5-TR: 'By definition, pedophilic disorder refers to a sexual interest in prepubescent children. Sexual interest in older children, i.e., pubescent children, aged approximately 11 to 14 years is termed hebephilia. However there is no recognized diagnosis for hebephilia.')

The consequence of these clinical definitions for SVPA litigation is direct and decisive: an evaluator who assigns a diagnosis of pedophilic disorder without first determining that the victim was prepubescent has not made a pedophilic disorder diagnosis at all. The evaluator has speculated that the child was probably prepubescent because the child was a certain age — and then labeled that speculation as a clinical diagnosis.

b. The Tanner Scale: The Medical Gold Standard for Determining Pubertal Status

The Tanner Scale, also known as the Sexual Maturity Rating (SMR), is the universally recognized pediatric and forensic medicine standard for classifying pubertal development. Developed by British pediatrician James Tanner following a two-decade longitudinal study, the Tanner Scale defines five discrete stages of physical development based on observable secondary sexual characteristics. The National Institutes of Health (NIH), the American Academy of Pediatrics, and leading pediatric endocrinology texts uniformly recognize Tanner staging as the 'gold standard' for assessing pubertal status. (StatPearls, Tanner Stages, NCBI Bookshelf, NBK470280.)

1. The Five Tanner Stages: Definitions

► **Tanner Stage 1 (Prepubescent):** No visible secondary sexual characteristics. Girls: no breast glandular tissue, no pubic hair. Boys: genitalia are prepubescent in size, no pubic hair. This is the only stage that is clinically prepubescent.

► **Tanner Stage 2 (Puberty Onset — Early Pubescent):** Girls: breast bud development (thelarche) — the appearance of glandular tissue under the areola. Boys: testicular volume increases to ≥4 mL. Scant pubic hair may appear. Entry into Tanner Stage 2 marks the clinical onset of puberty. The child is pubescent, not prepubescent.

► **Tanner Stage 3 (Mid-Pubescent):** Girls: further breast elevation; darker, curlier pubic hair. Boys: penis begins to lengthen; continued testicular growth; pubic hair grows. The child is mid-pubescent.

► **Tanner Stage 4 (Late Pubescent):** Girls: areolar mound formation; menarche typically begins around this stage (average age 12.5 years). Boys: continued genital development; spermarche. Near-adult development present.

► **Tanner Stage 5 (Post-Pubescent — Adult):** Full adult secondary sexual characteristics. Development complete.

For the purposes of a pedophilic disorder diagnosis, only Tanner Stage 1 is clinically prepubescent. A child at Tanner Stage 2 or beyond has entered puberty. An evaluator's conclusion that a victim was 'prepubescent' must, therefore, be grounded in evidence establishing that the victim was at Tanner Stage 1 at the time of the offense. Age alone does not establish this.

2. Population Statistics for Pubertal Onset — The Data Defense Counsel Must Know

Peer-reviewed pediatric research has comprehensively documented the age range over which children enter puberty. The key findings from major published studies — including StatPearls (NCBI, NBK470280), the CYGNET longitudinal cohort (Greenspan et al., Pediatric Academic Societies, presented data for 444 healthy girls), and Herman-Giddens et al. — are summarized in the following table, which is intended as a reference for defense counsel in evaluating an evaluator's age-based pedophilia assumptions:

TABLE 1: Tanner Stage Classifications — Medical Reference for SVPA Defense Counsel

Tanner Stage	Description	Girls: Age Range	Boys: Age Range	Pubescent Status	Forensic Significance
Stage 1	No secondary sex characteristics; fully prepubescent	< 8 years (typically)	< 9 years (typically)	PREPUBESCENT	Consistent with pedophilic disorder diagnosis
Stage 2	Onset of puberty: breast buds (girls); testicular enlargement (boys)	8–13 years (avg. 8.9–10 yrs)	9–14 years (avg. 9.5–11.6 yrs)	PUBESCENT — EARLY	NOT consistent with pedophilic disorder; possible hebephilia
Stage 3	Continued breast/genital development; pubic hair growth	10–14 years	10.5–15 years	PUBESCENT — MID	NOT consistent with pedophilic disorder
Stage 4	Near-adult development; menarche in girls	11–16 years	12–17 years	PUBESCENT — LATE	NOT consistent with pedophilic disorder
Stage 5	Full adult	14–18 years	15–20+ years	POST-	NOT

	development			PUBESCENT	consistent with pedophilic disorder

Sources: StatPearls, Tanner Stages (NCBI NBK470280); Marshall & Tanner (1969, 1970); Cleveland Clinic, Puberty: Tanner Stages for Boys and Girls; CYGNET Longitudinal Study (Greenspan et al.); Herman-Giddens et al., Pediatrics (1997, 2012).

The following table presents the statistical probability of a child being at Tanner Stage 2 or beyond (pubescent) at various ages, based on published population data. These percentages are the defense attorney's evidentiary foundation for the argument that age-based pedophilia diagnoses are speculative:

TABLE 2: Statistical Probability of Pubescent Status by Victim Age — Evidentiary Reference for Defense

Victim Age	% at Tanner Stage 1 (Prepubescent)	% at Tanner Stage 2+ (Pubescent)	Evidentiary Consequence
Under 8 (girls)	~91%+ (precocious puberty < 8 yrs is medically defined)	~9% or less	Prepubescent status statistically reliable
8 years (girls)	~85–91%	~9–15%	Majority prepubescent; but pubescent possibility exists
9 years (girls)	~50–75%	~25–50%	**25–50% pubescent: speculation threshold exceeded**
10 years (girls)	~25–40%	~60–75%	**Majority already pubescent — diagnosis unsupported**
11 years (girls)	~9–15%	~85–91%	**Diagnosis requires physical examination — not age**
Under 9 (boys)	~90%+	~10% or less	Prepubescent status statistically reliable
9–10 years (boys)	~65–80%	~20–35%	**20–35% pubescent: speculation threshold exceeded**
11 years (boys)	~40–55%	~45–60%	**Near-equal distribution: diagnosis requires physical data**

12 years (boys)	~20–35%	~65–80%	**Majority already pubescent — diagnosis unsupported**

Sources: StatPearls (NCBI NBK470280); CYGNET Study (Greenspan et al.); Herman-Giddens et al. (1997, 2012, Pediatrics); Worldwide Secular Trends in Pubertal Onset (PMC7042934). Age ranges reflect population variation by race/ethnicity; African American girls enter puberty on average 1–1.5 years earlier than the figures shown for white girls. Defense counsel should obtain race/ethnicity-specific data where known.

c. People v. Wright (2016): The Dispositive Precedent — Speculation on Victim Physical Development Is Inadmissible and Reversal-Warranting

People v. Wright (2016) 4 Cal.App.5th 537, 208 Cal.Rptr.3d 686

Facts: Wright was committed as an SVP based on a diagnosis of hebephilia — sexual attraction to pubescent children. His victims were 14 and 15 years old. The People's expert, Dr. Musacco, diagnosed hebephilia based on the victims' chronological ages, without any record of the victims' actual physical or sexual development.

The Expert Conceded the Fatal Gap: Dr. Musacco conceded at trial that children go through puberty at different ages (usually between 11 and 13), and that 'based solely on the age of *Wright's* victims (14 to 15) he could not tell whether they were in puberty when Wright committed lewd acts on them.' The expert nonetheless proceeded to diagnose hebephilia, calling it a 'close call.' The defense expert, Dr. Phoenix, declined to diagnose any disorder because there was 'no information regarding [the victims'] sexual characteristics or sexual maturity' — only their ages.

Held — Reversed: The Court of Appeal reversed Wright's SVP commitment. The court held that Dr. Musacco's diagnosis 'was based on pure speculation and conjecture about the victims' physical and sexual development' and therefore 'did not possess any evidentiary value.' The court applied the foundational principle: 'An expert opinion has no value if its basis is unsound . . . assumptions which are not grounded in fact cannot serve as the basis for an expert's opinion.' (Citing *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1136.) Further: 'A reasonable inference may not be based solely upon suspicion, imagination, speculation, supposition, surmise, conjecture, or guess work.' (Citing *People v. Raley* (1992) 2 Cal.4th 870, 891.)

The Holding's Scope: *Wright* was decided in the context of hebephilia, but its reasoning is not limited to that diagnosis. The holding is about the requirement that expert opinions on a mental disorder requiring a determination of victim pubertal status must be grounded in actual evidence of pubertal status — not assumed from age. This principle applies with equal force to pedophilic disorder diagnoses, where the diagnostic

criterion of prepubescent victim status is even more fundamental to the diagnosis than it is to hebephilia.

Wright is the directly applicable California authority for the argument that evaluators must ground their pedophilic disorder diagnoses in actual evidence of victim pubertal status. Chronological age, standing alone, is not such evidence. Where there is no physical development information in the record, the diagnosis is speculation and must be excluded.

d. The STATIC-99 Analogy: The Evaluator's Own Standard Shows Why Age-Based Pedophilia Diagnoses Are Insufficient

The argument that speculative diagnoses are legally sufficient cannot survive contact with the evaluator's own professional practices. Defense counsel should press the following point directly in the motion and at the hearing.

SVP evaluators routinely use the Static-99R actuarial risk assessment instrument to support Criterion C — the likelihood of reoffending. The Static-99R produces a percentage probability of sexual reoffense within a defined follow-up period. Evaluators regularly testify that a Static-99R score placing a respondent at even 10 to 20 percent above baseline recidivism is clinically and forensically significant — significant enough, in the evaluator's professional judgment, to support the conclusion that the respondent is 'likely to reoffend.' That 10-to-20-percent differential is treated as sufficient proof of dangerousness warranting indefinite civil commitment.

Now apply that same threshold to the pedophilia diagnosis question. The pediatric data in Table 2 shows that, at age 9, between 25 and 50 percent of girls have already entered puberty. At age 10, 60 to 75 percent of girls are pubescent. For boys at age 10, 20 to 35 percent are already pubescent. At age 11, boys are near-evenly split between prepubescent and pubescent.

If a 10-to-20-percent probability of reoffense is significant enough to establish the likelihood of dangerousness — justifying commitment — then a 25-to-75-percent probability that a victim was already pubescent is more than significant enough to establish that the evaluator cannot know the victim was prepubescent. The evaluator is applying a double standard: demanding only a 10-20 percent probabilistic threshold to prove dangerousness, while ignoring a 25-75 percent probabilistic threshold that directly undermines the foundational diagnostic criterion.

⚠ **The Core Argument:** When an evaluator uses Static-99R scores of 10–20% above baseline to prove likely dangerousness, but ignores a 25–75% probability that the victim

was pubescent rather than prepubescent, the evaluator is applying an inconsistent and self-serving standard. The court should hold the diagnosis to the same probabilistic rigor the evaluator applies to risk assessment. A diagnosis built on an assumption with a 25–75% chance of being factually wrong is not a diagnosis grounded in substantial evidence — it is speculation.

e. Language That Does Not Describe Physical Development: Why "Child," "Minor," "Little Girl," "Teenager" and Similar Terms Are Legally Irrelevant to a Pedophilic Disorder Diagnosis

Defense counsel will consistently encounter evaluators who, when pressed on the absence of physical development information in the record, fall back on descriptive language from police reports, probation reports, and prior evaluation documents. The evaluator will argue that references to the victim as a 'child,' a 'little girl,' a 'little boy,' a 'minor,' or a 'young child' support the prepubescent finding.

This argument must be squarely rejected, because these terms are legally and clinically meaningless as developmental evidence. Here is why:

1. These Terms Are Social and Legal Constructs, Not Developmental Descriptions

The word 'child' is a legal and social designation, not a clinical developmental description. Under California law, anyone under the age of 18 is a minor, a child, a person under 18. A 16-year-old in Tanner Stage 5 — fully post-pubescent — is legally a 'child' and a 'minor.' A 17-year-old is a 'young person.' A 15-year-old may be a 'teenager,' a 'girl,' or a 'little girl' in common parlance. None of these terms carries any information about physical developmental status.

The same is true of 'little boy,' 'little girl,' 'young child,' 'young teen,' and similar expressions. These are terms of perception, colloquy, and legal categorization. They are not clinical assessments of Tanner stage. An officer who describes a victim as a 'young girl' has provided zero information about whether that victim was at Tanner Stage 1, Tanner Stage 3, or anywhere else on the pubertal continuum.

2. These Terms Are Irrelevant Under Evidence Code Section 350

California Evidence Code section 350 provides that only relevant evidence is admissible: 'No evidence is admissible except relevant evidence.' Evidence Code section 210 defines relevant evidence as evidence 'having any tendency in reason to

prove or disprove any disputed fact that is of consequence to the determination of the action.'

The disputed fact at issue is whether the victim was prepubescent — at Tanner Stage 1 — because prepubescent status is an element of the DSM-5-TR Criterion A diagnostic requirement for pedophilic disorder. A term like 'child,' 'minor,' 'little girl,' or 'teenager' does not have any tendency in reason to prove or disprove prepubescent physical developmental status. It is, with respect to the diagnostic criterion, irrelevant. Defense counsel should move to exclude any expert testimony that treats these social or legal terms as clinical developmental evidence, because admitting such testimony on this basis would allow the evaluator to prove a clinical fact through legally irrelevant non-evidence.

3. The Only Relevant Evidence of Prepubescent Status

The only categories of evidence that are relevant to establishing a victim's prepubescent status for purposes of supporting a pedophilic disorder diagnosis are:

- ► Physical examination records documenting the absence of secondary sexual characteristics — i.e., clinical confirmation of Tanner Stage 1 status at or near the time of the offense.
- ► Medical records (pediatric, endocrinological, or otherwise) documenting the victim's developmental stage.
- ► Credible testimony from a witness with personal knowledge of the victim's physical development, where that testimony specifically addresses secondary sexual characteristics and is not merely a social perception or age-based assumption.
- ► The victim's age, where that age is below 8 for girls or below 9 for boys — because at those ages, the pediatric population data (see Table 2) establishes with sufficient statistical reliability (typically 85–91% or greater) that the child was at Tanner Stage 1. See Section F below for the safe-harbor age analysis.
- ► Direct documentary evidence specifically describing the victim's physical development in developmental terms.

⚠ **Objection Template:** When an evaluator testifies that a victim 'was a child' or 'appeared young' or 'was described as a little girl' as support for the prepubescent element of a pedophilic disorder diagnosis, the correct objection is: 'Objection. Relevance. Evidence Code § 350. The descriptive term ["child"/"minor"/"little girl"] is a social and legal categorization that provides no clinical information about the victim's physical developmental stage. It is not relevant to establishing the prepubescent status

required by DSM-5-TR Criterion A for pedophilic disorder. The testimony should be excluded or stricken.'

f. The Safe-Harbor Age Analysis: When Age Alone May Support the Prepubescent Finding

The argument in this subsection does not require the defense to establish that no victim's age can ever be evidence of prepubescent status. The published pediatric literature supports a narrow safe harbor: where a victim's age places her or him in the category for which precocious puberty is medically defined, the statistical probability of Tanner Stage 1 status is high enough that the evaluator's inference of prepubescent status is clinically reasonable rather than speculative.

1. The Medical Definition of Precocious Puberty Defines the Safe Harbor

Precocious puberty is the medical term for the onset of puberty at an abnormally early age. The clinical standard, reflected in StatPearls (NCBI NBK470280) and adopted by the American Academy of Pediatrics, is as follows:

> **Clinical Definition — Precocious Puberty:** *"Precocious puberty is defined as the onset of Tanner 2 secondary sexual characteristics before age 8 years in females or age 9 years in males if the continued progression of pubertal development occurs soon after." (StatPearls, NCBI NBK470280; Cleveland Clinic, Puberty: Tanner Stages for Boys and Girls.)*

This clinical definition means that the medical community has established, through decades of population data, that the onset of puberty before age 8 in girls or age 9 in boys is abnormal — it is defined as a medical condition (precocious puberty) precisely because it falls outside the normal distribution of pubertal timing. By implication:

- ► A girl under age 8 is statistically very likely to be at Tanner Stage 1. The probability that she has entered puberty (Tanner Stage 2+) is, by definition, in the range that constitutes a medical abnormality — approximately 9% or less based on the CYGNET study data (Tanner stage II breast development ranged from 9% of 7-year-old girls in the longitudinal CYGNET cohort).
- ► A boy under age 9 is similarly likely to be at Tanner Stage 1. Precocious puberty is defined by entry into Tanner Stage 2 before age 9.

Defense counsel's position, therefore, is not that age is always irrelevant to the prepubescent analysis. It is that age is only clinically sufficient to support an inference of prepubescent status when the victim's age falls below the precocious puberty threshold — below 8 for girls and below 9 for boys. Outside that narrow range, the age data shows enough distributional spread of pubescent children that the evaluator cannot reliably infer prepubescent status from age alone.

2. The Statistical Threshold: When Pubescent Probability Exceeds the Evaluator's Own Significance Standard

As established in Section D, SVP evaluators treat a 10-to-20-percent above-baseline probability of reoffense as clinically significant. By parallel reasoning, a 10-to-20-percent or greater probability that a victim was pubescent — not prepubescent — is clinically significant enough to defeat the inference of prepubescent status.

The published data in Table 2 shows that at age 9 for girls, the probability of pubescent status is approximately 25–50 percent. For girls aged 10, the pubescent probability exceeds 60–75 percent. For boys aged 10, pubescent probability is 20–35 percent. These figures all exceed the evaluator's own articulated significance threshold.

The argument defense counsel should make is simple and direct: if 10-to-20 percent is a significant enough probability to establish that the respondent is likely to reoffend — warranting indefinite civil commitment — then 25-to-75 percent is certainly a significant enough probability to establish that the evaluator cannot know the victim was prepubescent. An expert who acknowledges the significance of 10-20 percent probability in one analysis while dismissing 25-75 percent probability in another is applying an internally inconsistent standard that the court should reject.

g. Excluding Inadmissible Hearsay from Evaluator Reports: The Pre-PCH Line-by-Line Review

Evaluator reports in SVP proceedings are almost universally introduced into evidence as exhibits at the probable cause hearing. This is not a formality. The report itself — with all the case-specific facts, victim descriptions, uncharged offense details, institutional behavior records, and prior evaluation summaries it contains — becomes evidence before the court. Every category of inadmissible hearsay in the report, if not challenged and redacted before the report is admitted, comes before the court as if it were admissible evidence.

The governing law on this issue is established in Subsection K of this handbook and is not repeated in full here. The critical rules are:

► *People v. Sanchez* (2016) 63 Cal.4th 665: Expert witnesses cannot relate case-specific hearsay as true unless the hearsay is independently proven by admissible evidence or covered by an applicable hearsay exception.

► *People v. Burroughs* (2016) 6 Cal.App.5th 378: The § 6600(a)(3) exception does not extend to uncharged offenses or institutional behavior records.

► *Walker v. Superior Court* (2021) 12 Cal.5th 177: No implied hearsay exception for non-predicate offense hearsay in evaluation reports at the PCH.

► *Bennett v. Superior Court* (2019) 39 Cal.App.5th 862: Limiting instructions do not cure *Sanchez* hearsay errors at the PCH.

1. The Pre-PCH Report Review: A Required Step

Before the probable cause hearing, defense counsel must obtain all evaluator reports and conduct a line-by-line review of each report, categorizing every case-specific factual assertion as: (a) supported by admissible documentary evidence of a qualifying predicate offense under WIC § 6600(a)(3); (b) derived from non-qualifying offense hearsay; or (c) drawn from institutional records, prior evaluation reports, or other hearsay not covered by any exception. Categories (b) and (c) must be targeted for redaction before the report is admitted as an exhibit.

This line-by-line review is not optional. If counsel fails to identify and challenge inadmissible hearsay before the report is admitted, the hearsay becomes part of the evidentiary record at the PCH. Even if the court technically did not rely on specific hearsay in finding probable cause, the appellate record will show that the hearsay was before the court, making it difficult to demonstrate on review that the probable cause finding rested only on admissible evidence.

2. What to Look for in the Report Review — Specific to Pedophilia Diagnosis Cases

In SVP cases where the evaluator has diagnosed pedophilic disorder, defense counsel should flag the following categories with particular care during the pre-PCH report review:

► **Victim Age as Developmental Evidence:** Every instance where the evaluator uses a victim's age — rather than a description of physical characteristics — as evidence of prepubescent status. This is not an admissible basis for the diagnostic criterion. Flag it, and prepare a motion to exclude the corresponding opinion testimony.

► **Conflated Descriptive Language:** Every instance where the report describes a victim as 'a child,' 'a little girl,' 'a little boy,' 'a minor,' 'a young child,' or 'a teenager' and uses that language to infer prepubescent status. Flag it. These terms do not describe physical development and are irrelevant to the DSM-5-TR prepubescent criterion. Object to any expert testimony that relies on them for the developmental finding.

► **Details of Non-Qualifying Offenses:** Every instance where the evaluator describes the facts of an offense that is not a qualifying predicate offense under WIC § 6600(b). These are case-specific hearsay facts without the § 6600(a)(3) exception. Object and move to redact.

► **Prior Evaluation Contents Incorporated by Reference:** Every instance where the evaluator incorporates the findings, statements, or case-specific conclusions of prior evaluators — whether by direct quotation, paraphrase, or reference. Under *Burroughs*, experts cannot testify to the contents of reports prepared by other experts. Object and move to redact.

► **Institutional Records and Treatment Notes:** Every instance where the evaluator incorporates specific behavioral events, staff observations, rule violation descriptions, or treatment records from the respondent's institutional confinement. Under *Burroughs*, this category is inadmissible hearsay outside the § 6600(a)(3) exception. Object and move to redact.

► **Victim Statements from Non-Qualifying Offense Records:** Every instance where victim statements appear in police or probation reports for uncharged offenses or non-qualifying convictions, and are incorporated into the evaluator's report as case-specific facts. *Walker*, *Couthren*, and *Bennett* confirm these are inadmissible. Object and move to redact.

3. The Redaction Process: How to Seek It

To seek redaction of inadmissible hearsay from evaluation reports before they are admitted as exhibits, defense counsel should:

- **Step 1 — Annotated Copy:** Prepare an annotated copy of the evaluator's report with each challenged passage highlighted and coded by category: (H-NQ) for non-qualifying offense hearsay; (H-IB) for institutional behavior hearsay; (H-PE) for prior evaluator hearsay; (H-TN) for treatment notes hearsay; (H-AGE) for age-as-developmental-evidence speculation; and (H-LANG) for conflated non-developmental language used as developmental evidence.
- **Step 2 — Motion in Limine and § 402 Request:** File the Motion in Limine and Evidence Code § 402 hearing request (see Section H below) identifying each

challenged passage by page, paragraph, and category. Attach the annotated report as an exhibit to the motion.

- **Step 3 — Proposed Redacted Version:** Prepare and lodge a proposed redacted version of the evaluator's report showing, with strike-through formatting, every passage defense counsel seeks to exclude. Offer this to the court as the version to be admitted as the exhibit if the motion is granted.
- **Step 4 — § 402 Hearing:** Request that the court conduct the § 402 hearing before the PCH begins, so the court can make admissibility rulings on each challenged passage before the evaluator testifies. This prevents the evaluator from testifying to inadmissible material at the hearing itself, which would require mid-hearing objections and risk curative instruction problems under *Bennett*.
- **Step 5 — Preserve the Record:** If the court overrules any objection, state on the record: the specific basis for the objection, the legal authority supporting it (*Sanchez*, *Burroughs*, *Bennett*, *Couthren*, *Walker*, *Wright*), and the prejudice from admission. A complete record is essential for writ review under *Bennett* and *Walker* if probable cause is erroneously found.

h. The Motion in Limine: Complete Template for Probable Cause Hearing

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[SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF _________________]
              In re the Matter of: ____________________,
           Respondent.  People of the State of California,
Petitioner.  Case No.: _________________  DEFENDANT'S MOTION IN LIMINE
AND EVIDENCE CODE § 402 HEARING REQUEST RE: EXCLUSION OF SPECULATION
  ON VICTIM PUBERTAL STATUS AND INADMISSIBLE HEARSAY IN SUPPORT OF
 PEDOPHILIC DISORDER DIAGNOSIS  Hearing Date: _________________ Time:
                _________________ Dept.:  _________________
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NOTICE OF MOTION AND MOTION IN LIMINE; MEMORANDUM OF POINTS AND AUTHORITIES

Evidence Code §§ 350, 402, 800, 801, 802; Welfare and Institutions Code § 6600(a)(3)

TO THE HONORABLE COURT AND TO THE DISTRICT ATTORNEY OF _____ COUNTY:

PLEASE TAKE NOTICE that, before the commencement of the probable cause hearing in this matter, Respondent _____ ("Respondent"), by and through undersigned counsel, moves this Court, pursuant to California Evidence Code §§ 350 and 402, for an order:

(1) Requiring the Court to conduct a preliminary hearing under Evidence Code § 402 to determine the admissibility of the pedophilic disorder diagnosis contained in the evaluation reports of the People's designated evaluators;

(2) Excluding any expert opinion testimony diagnosing Respondent with pedophilic disorder based solely on a victim's chronological age without physical developmental evidence establishing Tanner Stage 1 prepubescent status;

(3) Excluding references to victim descriptions using the terms "child," "minor," "little girl," "little boy," "teenager," or similar non-developmental language as evidence of the victim's prepubescent physical developmental status;

(4) Ordering the redaction from evaluator reports of all case-specific hearsay not covered by an applicable hearsay exception, including hearsay regarding non-qualifying offenses, institutional conduct records, prior evaluator reports, and treatment records, before those reports are admitted as exhibits; and

(5) Excluding all expert testimony relying on such redacted hearsay as the basis for case-specific factual assertions.

This motion is made on the grounds set forth in the Memorandum of Points and Authorities below, and on such oral argument and documentary evidence as may be presented at the § 402 hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The People seek to commit Respondent as a sexually violent predator (SVP) under Welfare and Institutions Code section 6600 et seq. Central to the People's case is a diagnosis of pedophilic disorder rendered by [Evaluator Name(s)] of the Department of State Hospitals. That diagnosis, as set forth in the evaluators' reports, rests on assumptions about the physical developmental status of the alleged victim(s) that are not supported by any physical developmental evidence in the record. The evaluators have substituted the victim(s)' chronological age for the clinical determination of

prepubescent status that the DSM-5-TR expressly requires. Under *People v. Wright* (2016) 4 Cal.App.5th 537 and the foundational principles of California evidence law, an expert opinion built on speculation about a foundational diagnostic fact is inadmissible.

Additionally, the evaluators' reports contain extensive case-specific hearsay — descriptions of uncharged offenses, victim allegations from non-qualifying convictions, institutional conduct records, and prior evaluator findings — that are not covered by any applicable hearsay exception and are inadmissible under *People v. Sanchez* (2016) 63 Cal.4th 665, *People v. Burroughs* (2016) 6 Cal.App.5th 378, *People v. Bennett v. Superior Court* (2019) 39 Cal.App.5th 862, *People v. Superior Court* (*Couthren*) (2019) 41 Cal.App.5th 1001, and *Walker v. Superior Court* (2021) 12 Cal.5th 177. These reports will be offered as exhibits at the probable cause hearing. Inadmissible hearsay must be redacted before admission.

This motion requests a § 402 hearing to determine the admissibility of the challenged expert opinions and hearsay material before the probable cause hearing commences.

II. LEGAL STANDARD — EVIDENCE CODE § 402 HEARING

California Evidence Code section 402, subdivision (a) provides: 'When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.' Subdivision (b) authorizes the court to 'hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury' — or, in this case, before the commencement of the probable cause hearing.

A 'preliminary fact' under Evidence Code section 400 is 'a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence.' Here, the preliminary fact in dispute is whether the People's evaluators had a legally sufficient factual basis — specifically, evidence of victim prepubescent status — to render a pedophilic disorder diagnosis that will be admissible as evidence at the probable cause hearing.

The California Supreme Court has confirmed that trial courts have a gatekeeping function over expert testimony: 'the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture.' (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770.) Expert opinions that are speculative, are founded on assumptions without evidentiary support, or are based on methodologies that contradict established clinical criteria are inadmissible. (*Ibid.*; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1136.)

III. ARGUMENT

ARGUMENT I — AGE ALONE CANNOT ESTABLISH PREPUBESCENT STATUS UNDER DSM-5-TR CRITERION A — OPINION TESTIMONY RESTING SOLELY ON VICTIM AGE IS INADMISSIBLE SPECULATION: The DSM-5-TR Criterion A for pedophilic disorder requires recurrent sexual urges or behaviors involving a prepubescent child. The DSM-5-TR itself uses the word prepubescent, not young, not minor, and not a child under 13. Prepubescent is a clinical developmental status, not an age category. Under the Tanner Scale — the gold standard for assessing pubertal development, as recognized by the NIH, the American Academy of Pediatrics, and all major pediatric endocrinology authorities — a prepubescent child is one at Tanner Stage 1, with no visible secondary sexual characteristics. Entry into Tanner Stage 2 marks the onset of puberty and the transition from prepubescent to pubescent status.

Peer-reviewed pediatric research establishes that children enter puberty across a wide age range that overlaps substantially with the ages the evaluators have identified as 'prepubescent' victims. For girls, the normal onset of puberty ranges from age 8 to 13, averaging 8.9 to 10 years depending on race and ethnicity. (StatPearls, NCBI NBK470280.) The CYGNET longitudinal study of 444 healthy girls found that 9% of 7-year-olds and 25-50% of 9-year-olds had already reached Tanner Stage 2 or beyond. At age 10, 60-75% of girls were already pubescent. For boys, puberty onset ranges from age 9 to 14, with American studies (Herman-Giddens et al., Pediatrics, 2012) finding boys entering Tanner Stage 2 at a mean age of approximately 9.5-11.6 years depending on race. At age 10, 20-35% of boys are already pubescent. At age 11, that figure approaches 45-60%.

These population-level statistics mean that for victims in the age ranges commonly cited in SVP evaluations as evidence of pedophilic attraction — ages 8 to 12 — there is a statistically material and clinically significant probability that any given child was already pubescent. Where that probability meets or exceeds 10-25%, the evaluator's assumption of prepubescent status is speculation, not clinical inference.

Under *People v. Wright* (2016) 4 Cal.App.5th 537, 208 Cal.Rptr.3d 686, an SVP expert's mental disorder diagnosis that is 'based on pure speculation and conjecture about the victims' physical and sexual development' has 'no evidentiary value' and the commitment based on it must be reversed for lack of substantial evidence. *Wright* reversed an SVP commitment precisely because the People's expert diagnosed a sexual disorder requiring knowledge of victim pubertal status without any physical developmental evidence. The same result is required here, and the appropriate vehicle to enforce it is a § 402 hearing before the evaluation report is admitted and before the evaluator testifies.

The Court should hold that any opinion diagnosing pedophilic disorder based solely on victim age, without physical developmental evidence establishing Tanner Stage 1 status, lacks an adequate foundation and is inadmissible.

ARGUMENT II — THE EVALUATORS CANNOT RELY ON A DOUBLE STANDARD — PROBABILISTIC THRESHOLDS USED TO ESTABLISH REOFFENSE LIKELIHOOD MUST BE APPLIED EQUALLY TO THE DIAGNOSTIC FOUNDATION: The People's evaluators have applied Static-99R actuarial scores to establish that Respondent is likely to reoffend. The evaluators have relied on probability estimates of 10-20% above baseline reoffense rates as clinically significant — significant enough to support the conclusion of dangerousness required for SVP commitment. If a 10-20% probability is meaningful enough to establish future dangerousness warranting indefinite confinement, then the 25-75% probability that a victim was already pubescent — derived from the same peer-reviewed scientific literature the evaluators rely on professionally — is more than significant enough to establish that the evaluators cannot reliably conclude the victim was prepubescent.

The evaluators cannot credibly argue that 10-20% probability is significant for their risk assessment but that 25-75% probability is insignificant for the diagnostic foundation. This inconsistency is not a matter of clinical judgment; it is a logical impossibility. An expert opinion that treats the same magnitude of probability as decisive in one analysis while disregarding it in another is not the product of sound methodology. It is the product of result-oriented reasoning, and it does not constitute substantial evidence. (*Sargon Enterprises, supra*, 55 Cal.4th at p. 770; *Pacific Gas & Electric Co. v. Zuckerman, supra*, 189 Cal.App.3d at p. 1136.)

The Court should require the evaluators, at the § 402 hearing, to explain their methodology for determining victim prepubescent status and to identify what probabilistic threshold would lead them to conclude that a victim was pubescent rather than prepubescent. If the evaluators cannot articulate such a threshold, or if their threshold is lower than the probabilistic significance they assign to Static-99R scores, the Court should exclude the diagnosis as methodologically unsound.

ARGUMENT III — DESCRIPTIVE TERMS SUCH AS "CHILD," "MINOR," "LITTLE GIRL," "LITTLE BOY," AND "TEENAGER" ARE IRRELEVANT TO THE PREPUBESCENT STATUS DETERMINATION AND MUST BE EXCLUDED: The evaluators' reports use terms including 'child,' 'children,' 'minor,' 'little girl,' 'little boy,' 'teenager,' and similar expressions in connection with the alleged victims. These terms are being used to suggest or imply prepubescent status. They are legally and

> clinically irrelevant to the DSM-5-TR Criterion A determination, and any testimony treating them as evidence of victim developmental status must be excluded under Evidence Code section 350.

California Evidence Code section 350 provides that '[n]o evidence is admissible except relevant evidence.' Section 210 defines relevant evidence as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The disputed fact is whether the victim was at Tanner Stage 1 — prepubescent. A legal or social categorization of a person as a 'child' or 'minor' does not have any tendency in reason to establish Tanner Stage 1 status. These terms describe a legal relationship between a person's age and the law's age of majority. They describe social perception. They do not describe secondary sexual characteristics, hormonal development, or any other biological marker of pubertal status.

Consider: a 16-year-old is legally a 'minor,' socially a 'child' in the view of some adults, and a 'teenager' by age. The same 16-year-old is clinically postpubescent — Tanner Stage 5. A 15-year-old may be described as a 'young girl.' She may be fully pubescent at Tanner Stage 4. A police officer who describes a victim as 'a young child' has provided the evaluator with zero clinical information. An evaluator who treats 'a young child' as evidence of prepubescent status has committed the same error the People's expert committed in *Wright* — building a diagnosis on an assumed, and unverified, factual foundation.

Any expert testimony that relies on the following terms as developmental evidence must be excluded or stricken: child, children, minor, little girl, little boy, young child, young person, teenager, adolescent, juvenile, or any other social or legal categorization. The only relevant evidence is physical developmental evidence. Any testimony or report passage substituting social or legal categorization for physical developmental evidence is irrelevant under Evidence Code sections 210 and 350.

Limited Exception — The Under-8/Under-9 Safe Harbor:

Respondent acknowledges that age evidence retains some probative value where a victim's age falls below the medical definition of precocious puberty: below age 8 for girls and below age 9 for boys. At those ages, the medical definition of precocious puberty establishes that entry into puberty is a medically recognized abnormality. The statistical probability of Tanner Stage 1 status is approximately 91% or greater for girls under 8 and similarly high for boys under 9. In that narrow age range, age evidence is not pure speculation. For all victims at or above age 8 (girls) or age 9 (boys), however, physical developmental evidence is required. Age alone is insufficient.

ARGUMENT IV — THE EVALUATION REPORTS MUST BE REDACTED TO REMOVE INADMISSIBLE HEARSAY BEFORE ADMISSION AS EXHIBITS: The People intend to introduce the evaluators' reports as exhibits at the probable cause hearing. Those reports contain extensive case-specific hearsay that is inadmissible under the governing California Supreme Court and Court of Appeal authority. If the reports are admitted in their current form, inadmissible hearsay will become part of the evidentiary record of the PCH, regardless of whether it is expressly relied upon in the court's probable cause finding. The hearsay must be redacted before admission.

The following categories of material in the evaluators' reports are inadmissible hearsay and must be redacted:

(a) Details of uncharged offenses and non-qualifying convictions: Any case-specific facts about conduct for which Respondent was not convicted of a qualifying sexually violent offense under WIC § 6600(b), derived from police reports, investigative reports, probation reports, or any other hearsay source. Under *People v. Burroughs* (2016) 6 Cal.App.5th 378 and *Walker v. Superior Court* (2021) 12 Cal.5th 177, the § 6600(a)(3) hearsay exception does not extend to non-predicate offenses. This material is inadmissible hearsay.

(b) Contents of prior evaluator reports: Any case-specific facts derived from the reports, notes, or findings of prior evaluators who are not testifying at this hearing. Under *Burroughs*, experts cannot testify to the case-specific contents of reports prepared by other experts. The underlying reports are hearsay as to the current evaluator. Material derived from them must be redacted.

(c) Institutional conduct and state hospital records: Any case-specific facts about Respondent's behavior during institutional confinement — including rule violations, behavioral incidents, treatment non-compliance episodes, staff observations, and program records — derived from institutional hearsay documents. *Burroughs* held expressly that expert testimony about 'appellant's behavior while in state custody' based on institutional hearsay is inadmissible.

(d) Treatment records and clinical notes from non-testifying staff: Any case-specific statements, behavioral observations, or treatment progress descriptions derived from medical records, psychology notes, or treatment team documentation authored by persons not testifying as witnesses. These are hearsay without an applicable exception in the SVP probable cause context.

(e) Victim developmental descriptions using non-developmental language: Any passage in the reports that purports to establish victim prepubescent status

through social or legal categorizations ('child,' 'minor,' 'little girl,' 'little boy,' 'teenager') rather than physical developmental evidence. As argued in Argument III above, this material is irrelevant, not merely hearsay — but to the extent it appears in the reports as factual assertions about victim status, it is also hearsay without foundation.

Respondent requests that the Court order the People to lodge a redacted version of each evaluator report, with all challenged material stricken, before the report is admitted as an exhibit. Respondent has prepared a proposed redacted version of each challenged report, lodged herewith as Exhibits __, which the Court may use as a guide.

The Court's authority to require redaction is confirmed by *Bennett v. Superior Court* (2019) 39 Cal.App.5th 862, which reversed a probable cause finding because the trial court admitted expert testimony relying on inadmissible hearsay about a non-qualifying offense. The *Bennett* court did not hold that the hearsay was harmless because it was accompanied by a limiting instruction; it held the admission was prejudicial error requiring reversal. The appropriate prophylactic measure is to redact the inadmissible material before the hearing begins, not to attempt to cure the error after the fact.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court:

1. Conduct a hearing pursuant to California Evidence Code § 402 to determine the admissibility of the pedophilic disorder diagnosis in the evaluators' reports;

2. Exclude any expert opinion testimony diagnosing Respondent with pedophilic disorder that is based solely on the chronological age of the alleged victim(s), without physical developmental evidence establishing Tanner Stage 1 prepubescent status, as inadmissible speculation under *People v. Wright* (2016) 4 Cal.App.5th 537;

3. Exclude any expert testimony or report language that treats social or legal descriptors ('child,' 'minor,' 'little girl,' 'little boy,' 'teenager,' or similar terms) as evidence of victim prepubescent physical developmental status, as irrelevant under Evidence Code sections 210 and 350;

4. Order the redaction of all inadmissible case-specific hearsay from the evaluators' reports — including hearsay about non-qualifying offenses, prior evaluator reports, institutional conduct records, and treatment records — before those reports are admitted as exhibits at the probable cause hearing, pursuant to *People v. Sanchez* (2016) 63 Cal.4th 665, *People v. Burroughs* (2016) 6 Cal.App.5th 378, *Bennett v.*

Superior Court (2019) 39 Cal.App.5th 862, *People v. Superior Court* (*Couthren*) (2019) 41 Cal.App.5th 1001, and *Walker v. Superior Court* (2021) 12 Cal.5th 177; and

5. Exclude all expert testimony relying on the categories of hearsay identified for redaction as the basis for case-specific factual assertions at the probable cause hearing.

Dated: _____ Respectfully submitted, _____ [Counsel Name] [Bar Number] [Address] [Phone] Attorney for Respondent _____

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i. Post-§ 402 Hearing Practice: What to Do With the Ruling

If the motion is granted in full or in part, defense counsel should ensure the following:

- **Document the Ruling:** Obtain the court's ruling in writing or on the transcript. The record of what hearsay was excluded and what was admitted is essential for appellate review if probable cause is found.
- **Enforce the Ruling During Testimony:** Monitor the evaluator's testimony at the PCH against the court's rulings. Object immediately and specifically — citing the court's own § 402 ruling — if the evaluator attempts to testify to material the court has excluded or redacted.
- **If the Motion Is Denied:** Make a complete objection on the record to every item of challenged evidence as it is offered, citing the specific authority for exclusion. State that the objection is renewed from the motion in limine. This preserves the issue for writ review under *Bennett* (which reversed a PCH finding for admission of non-qualifying offense hearsay) and for appeal.
- **Writ Review After PCH:** If probable cause is found and the court relied on improperly admitted pedophilia diagnosis testimony or inadmissible hearsay, immediately evaluate filing a writ petition under *Bennett* and *Walker*. Both cases authorize writ review of PCH rulings where the probable cause finding rested on inadmissible evidence.

The pedophilic disorder diagnosis is not a gateway through which SVP evaluators may freely speculate. It is a clinical determination with a precise and demanding criterion: the victim must have been prepubescent. The science of pubertal development

establishes that age is not a reliable proxy for that criterion across the age ranges most commonly encountered in SVP cases. The law of People v. Wright confirms that speculation on victim developmental status is inadmissible. Defense counsel who enforce these rules at the probable cause stage — through a thorough pre-hearing review of evaluator reports, a properly framed § 402 motion, and disciplined objections during testimony — serve not only their client's liberty interests but the evidentiary integrity of proceedings that carry the highest stakes California's civil law imposes.

j. Challenging A Paraphilia Diagnosis

Section on Cross-Examination of DSH Evaluators and Diagnostic Challenges Under the DSM-5-TR

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a. Overview: The DSM-5-TR Paraphilic Disorder Framework and Its Forensic Vulnerabilities

A paraphilic disorder diagnosis is the gateway to SVP commitment under the Welfare and Institutions Code. Without a qualifying diagnosed mental disorder — defined in WIC § 6600(c) as a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts — the People cannot sustain an SVP petition. The diagnosis is therefore not a peripheral clinical observation but the constitutional foundation of the entire commitment. A successful challenge to the diagnosis or its application can defeat commitment or require the respondent's release.

The DSM-5-TR lists eight specific paraphilic disorders: (1) Voyeuristic Disorder, (2) Exhibitionistic Disorder, (3) Frotteuristic Disorder, (4) Sexual Masochism Disorder, (5) Sexual Sadism Disorder, (6) Pedophilic Disorder, (7) Fetishistic Disorder, and (8) Transvestic Disorder. These eight were selected for inclusion because they are relatively common, and some involve behaviors classed as criminal offenses. Beyond these eight, the DSM-5-TR provides residual categories: Other Specified Paraphilic Disorder (OSPD) and Unspecified Paraphilic Disorder, which replaced the former Paraphilia Not Otherwise Specified (Paraphilia NOS) category from earlier DSM editions.

Every paraphilic disorder diagnosis in the DSM-5-TR has two threshold components. Criterion A defines the paraphilia itself — the atypical sexual arousal pattern — and requires that it be recurrent, intense, and present for at least six months. Criterion B is the disorder threshold — the harm component. Criterion B differs depending on whether the disorder involves nonconsenting persons: for those that do (voyeuristic,

exhibitionistic, frotteuristic, sexual sadism), the person must have acted on the urges or the urges/fantasies must cause marked distress or interpersonal difficulty. For those that do not involve nonconsenting persons (sexual masochism, fetishistic, transvestic), the urges, fantasies, or behaviors must cause clinically significant distress or impairment. Pedophilic disorder has its own distinct criteria. The critical point for defense attorneys is that behavior alone does not establish Criterion A — the behavior must be a manifestation of an atypical arousal pattern.

CRITICAL DSM-5-TR PRINCIPLE EVERY ATTORNEY MUST KNOW

The DSM-5-TR explicitly states that 'a clinical diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.' (DSM-5, p. xxiii). The diagnosis alone does not establish volitional impairment, dangerousness, or SVP status.

Having committed a sexual offense does not equal having a paraphilic disorder. Criterion A requires that the behavior be a manifestation of an atypical arousal pattern — not merely that the behavior occurred.

A majority of sex offenses are not committed by persons with a paraphilic disorder. Research consistently shows that a substantial proportion of sex offenses are not a manifestation of a paraphilic arousal pattern. (First, M.B., Journal of AAPL, 2014.)

b. The Failed Diagnosis: Paraphilia NOS, Other Specified Paraphilic Disorder, and Standalone "Paraphilia"

(i) The History of Paraphilia NOS in SVP Proceedings — A Diagnosis Made to Fail

For decades, DSH evaluators and state-hired forensic psychologists used the diagnosis "Paraphilia Not Otherwise Specified, Nonconsent" or "Paraphilia NOS, Rape" to justify SVP commitment of persons who had committed sexual assault against adult women but did not meet criteria for any specific named paraphilia. This practice was exposed as methodologically and ethically bankrupt. DSM-III, DSM-III-R, DSM-IV, and DSM-5 all explicitly rejected the concept that rape or nonconsent is itself a mental disorder. The APA Task Force, DSM work groups, and prominent forensic psychiatrists — most prominently Dr. Allen Frances, chair of the DSM-IV Task Force — publicly stated that Paraphilia NOS, Nonconsent was a misuse of psychiatric diagnosis, had never been a legitimate diagnostic category, and had no research support for reliability or validity in forensic settings.

In *People v. Smith* (2022) 75 Cal.App.5th 322, the California Court of Appeal addressed a respondent whose SVP commitment rested on a diagnosis of 'Other Specified Paraphilia' — the DSM-5 replacement for Paraphilia NOS. The court granted

respondent's release petition after finding that the diagnosis of "Other Specified Paraphilia" was invalid as applied. The Smith decision is critical because it directly undermines the use of residual paraphilia categories in SVP proceedings and establishes that a diagnosis unsupported by specific, recognized DSM criteria — particularly where the underlying concept (paraphilic rape) has been repeatedly rejected by the DSM — cannot constitute the qualifying mental disorder required for SVP commitment under WIC § 6604.

> *People v. Smith (2022) 75 Cal.App.5th 322: Smith's diagnosis of 'Other Specified Paraphilia' held invalid. The court granted release petition based on the invalid diagnosis and Smith's failure to reoffend during conditional release. Reinforces that residual paraphilia categories cannot substitute for recognized DSM diagnoses.*
> *People v. Smith (2020) 49 Cal.App.5th 445 (Smith III): Prior appeal history noting that SVP commitment requires a diagnosed mental disorder making the person likely to engage in sexually violent criminal behavior.*
> *Dr. Allen Frances, DSM-IV Task Force Chair: 'Diagnosing rape as a mental disorder is an improper use of psychiatric diagnosis and promotes the abuse of psychiatric commitment to further what would otherwise be an unconstitutional form of preventive detention.' (Psychiatric Times, 2013.)*
> *Frances, A. (2011), Journal of AAPL 39(4):555: 'The idea that paraphilic rape should be an official category in the psychiatric diagnostic manual has been explicitly rejected by DSM-III, DSM-III-R, DSM-IV, and, recently, DSM-5. Despite this, paraphilia NOS, nonconsent, is still frequently used by mental health evaluators in SVP cases.'*
> *First, M.B. (2014), Journal of AAPL 42(2):191: The Other Specified and Unspecified paraphilic disorder categories 'do not carry with them the same degree of utility as the specific named categories and thus have the potential to be misused.'*

(ii) Standalone "Paraphilia" Without a Specific DSM Diagnosis — Why It Fails

If the evaluator's report diagnoses the client simply with "Paraphilia" — without specifying one of the eight named disorders in the DSM-5-TR — the diagnosis is facially invalid. A bare "Paraphilia" is not a DSM-5-TR diagnosis. The DSM-5-TR distinguishes between a paraphilia (an atypical sexual interest, which is not a mental disorder) and a paraphilic disorder (which meets both Criterion A and Criterion B and qualifies as a mental disorder). An evaluator who diagnoses "Paraphilia" without the disorder component has identified only an atypical sexual interest, not a mental disorder, and thus has not identified any qualifying condition for SVP commitment.

Similarly, the residual category "Other Specified Paraphilic Disorder" requires the evaluator to specify the particular paraphilic behavior by name and must involve an atypical focus that is not included in the eight named diagnoses but still meets the general Criterion A and B thresholds for a paraphilic disorder. Where an evaluator uses OSPD to bootstrap a diagnosis of rape, nonconsent, hebephilia, or any concept rejected by prior DSM editions, the diagnosis is subject to challenge on the grounds that it (1) is

not a recognized DSM category, (2) lacks the research support that named diagnoses possess, (3) lacks interrater reliability, and (4) has been weaponized to circumvent the DSM's deliberate rejection of the underlying clinical concept.

CROSS-EXAMINATION PATH: PARAPHILIA NOS / OTHER SPECIFIED / STANDALONE PARAPHILIA

- Q: What specific DSM-5-TR diagnosis did you assign to my client? Get the exact name on the record.
- Q: If the answer is 'Other Specified Paraphilic Disorder' or 'Paraphilia' without a named type: What is the specific atypical arousal pattern that forms the basis of this diagnosis?
- Q: Is paraphilic rape — or 'nonconsent' as a paraphilia — included as a diagnosis in the DSM-5-TR? (Answer: No.)
- Q: Is it true that the concept of 'paraphilic coercive disorder' or 'nonconsent' was explicitly proposed and rejected by the DSM-III, DSM-III-R, DSM-IV, and DSM-5 work groups — five separate times in the past 35 years?
- Q: Is it true that the APA Task Force specifically excluded nonconsent as an example of Paraphilia NOS to prevent its misuse in forensic proceedings?
- Q: Are you aware of the California Court of Appeal's decision in *People v. Smith* (2022) 75 Cal.App.5th 322, which found that an 'Other Specified Paraphilia' diagnosis was invalid as the basis for SVP commitment?
- Q: What research studies establish the interrater reliability of an OSPD diagnosis in the forensic context? (Expect inability to cite specific validated studies.)
- Q: The DSM-5-TR states that OSPD and Unspecified Paraphilic Disorder residual categories 'do not carry with them the same degree of utility as the specific named categories and thus have the potential to be misused.' Are you aware of that DSM-5-TR statement?

c. Universal Cross-Examination Framework Applicable to ALL Paraphilic Disorder Diagnoses

Before examining each specific diagnosis, attorneys must understand the universal challenges that apply to every paraphilic disorder diagnosis in the SVP context. These challenges attack the diagnostic methodology rather than the specific content of the

diagnosis and are applicable in every case regardless of which paraphilia the evaluator has assigned.

THE FOUR UNIVERSAL CHALLENGES TO ANY PARAPHILIC DISORDER DIAGNOSIS

Challenge 1 — Criterion A Is Not Established by Conduct Alone: The DSM-5-TR modified Criterion A precisely to prevent evaluators from diagnosing a paraphilic disorder based entirely on the presence of sexual acts. The behaviors must be a manifestation of an atypical arousal pattern, not merely descriptive of the type of act. An evaluator who diagnosed based on offense history alone has violated this principle.

Challenge 2 — The Diagnosis Cannot Be Based Solely on Criminal Behavior: A diagnosis justified solely by the fact of conviction or the pattern of offenses conflates criminality with mental disorder. The Supreme Court in *Kansas v. Hendricks* (1997) and *Kansas v. Crane* (2002) requires that the mental disorder distinguish the SVP from the dangerous-but-typical recidivist. If the evaluator's diagnosis depends solely on criminal history, this constitutional distinction is not met.

Challenge 3 — Interrater Reliability Problems for All Paraphilia Diagnoses in SVP Settings: Research has consistently documented that paraphilia diagnoses in SVP commitment settings have poor interrater reliability even for the named categories. (Perillo et al. (2014), Int'l J.L. & Psychiatry 37:190; First (2014), Journal of AAPL 42:191; Scurich et al. (2025).) An evaluator who has not addressed interrater reliability has not demonstrated that the diagnosis would be consistent across qualified examiners.

Challenge 4 — The DSM Disclaimer: The DSM-5 explicitly states on page xxiii that a clinical diagnosis 'is not sufficient to establish the existence for legal purposes of a mental disorder' and that 'having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.' Every evaluator must be confronted with this disclaimer.

UNIVERSAL CROSS-EXAMINATION QUESTIONS FOR ANY PARAPHILIC DISORDER DIAGNOSIS

- Q: Is it true that the DSM-5 states on page xxiii that 'a clinical diagnosis in itself does not establish the existence for legal purposes of a mental disorder'?
- Q: Is it true that 'having the diagnosis does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time'?
- Q: What is the interrater reliability of this diagnosis in the forensic SVP setting — meaning the kappa coefficient or agreement rate when two independent evaluators

assess the same case?

- Q: Did you conduct phallometric testing (PPG/penile plethysmography) to objectively verify the arousal pattern underlying this diagnosis? If not, what objective evidence supports Criterion A?
- Q: A substantial proportion of sex offenses are not manifestations of paraphilic arousal patterns. How did you rule out that this client's offenses were opportunistic, substance-induced, or antisocial conduct without an underlying atypical arousal pattern?
- Q: How many clinical interviews did you conduct with the client? Did the client disclose or confirm the atypical arousal pattern you are attributing to him?
- Q: If the client denies the paraphilic arousal pattern: The DSM-5-TR states that nondisclosing individuals 'may be ascertained to have [the paraphilia].' What objective evidence beyond offense history did you use to ascertain the arousal pattern in this nondisclosing individual?
- Q: Did you conduct a complete differential diagnosis that ruled out alternative explanations for the sexual conduct, including antisocial personality, substance use, situational or opportunistic behavior?

d. Challenging Each Specific DSM-5-TR Paraphilic Disorder Diagnosis

1. Voyeuristic Disorder

DSM-5-TR Criterion A: Over a period of at least six months, recurrent and intense sexual arousal from observing an unsuspecting person who is naked, in the process of disrobing, or engaging in sexual activity, as manifested by fantasies, urges, or behaviors. The individual must be at least 18 years old. Criterion B: Has acted on the sexual urges with a nonconsenting person, or the urges or fantasies cause marked distress or interpersonal difficulty.

The critical clinical research challenge is that voyeuristic behavior is extraordinarily common in the general population and thus does not reliably indicate the presence of the disorder. Studies report that 54% of men have voyeuristic fantasies and 42% have engaged in voyeuristic behavior at least once. A Swedish national study found that 7.7% of both men and women had engaged in voyeurism. Voyeuristic acts have been estimated to occur 150 times more frequently than police reports reflect. The Merck Manual notes that the frequency of voyeuristic disorder itself is unknown, with an

estimated highest possible lifetime prevalence of only 12% for males — meaning even this most generous figure applies to only a fraction of those who engage in voyeuristic behavior. There is an additional diagnostic concern identified in forensic literature: the diagnosis has been critiqued for 'lack of clarity' in its DSM-5-TR criteria regarding what constitutes 'intense' arousal distinguishable from common voyeuristic interest. (Balon, R. (2016), J Sex Marital Ther 42(5):391.)

> *Langstrom & Seto (2006), Archives of Sexual Behavior: Swedish national survey finding 7.7% general population engagement in voyeuristic behavior — demonstrating that voyeuristic behavior is common and does not itself establish disorder.*
> *Balon, R. (2016), J Sex Marital Ther 42(5):391: Documents 'lack of clarity' in DSM-5-TR criteria for voyeuristic disorder.*
> *First, M.B. (2014), Journal of AAPL 42(2):191: Voyeuristic disorder is among those where the text statements suggesting 'recurrent sexually offending behavior alone is sufficient to ascertain the presence of a paraphilia are in conflict with the evidence.'*

Q: *Given that 42% of men have engaged in voyeuristic behavior at least once, how do you distinguish a person who has engaged in voyeuristic conduct from a person who has Voyeuristic Disorder as defined in the DSM-5-TR?*

- Purpose: Forces the evaluator to articulate a clinical distinction beyond the mere fact of voyeuristic acts.
- Follow-up: What specific evidence in this case establishes that the arousal pattern is 'recurrent and intense' rather than opportunistic or situational?
- Follow-up: What objective measure — other than offense history — did you use to establish the paraphilic arousal pattern required by Criterion A?

2. Exhibitionistic Disorder

DSM-5-TR Criterion A: At least six months of recurrent and intense sexual arousal from exposure of genitals to an unsuspecting person, as manifested by fantasies, urges, or behaviors. Specifiers require the evaluator to identify whether the arousal is to prepubescent children, physically mature individuals, or both. Criterion B: Has acted on the urges with a nonconsenting person, or the urges or fantasies cause marked distress or interpersonal difficulty.

The central research challenge to exhibitionistic disorder is the Marshall and Fernandez (2003) phallometric study, which reviewed 10 studies of exhibitionists using penile plethysmography (PPG) and found that 9 out of 10 studies indicated that exhibitionists in clinical settings did not have a paraphilic preference for exposing themselves. This means that the large majority of individuals who commit exhibitionistic acts do not have

the atypical arousal pattern required for Criterion A of the diagnosis. This is precisely the research basis for the DSM-5-TR's modified Criterion A — the behavior alone does not establish the disorder. The highest possible prevalence of exhibitionistic disorder in males is estimated at 2–4%, far lower than the rate of exhibitionistic offending, confirming that most who exhibit are not acting from a paraphilic arousal pattern.

> *Marshall & Fernandez (2003), cited in Wakefield (2011), Int'l J.L. & Psychiatry 34:195: Review of 10 phallometric studies of exhibitionists — 9 of 10 showed exhibitionists in clinical settings did NOT have a paraphilic preference for exposing themselves.*
> *First, M.B. (2014), Journal of AAPL 42:191: The evidence shows 'a substantial proportion of sex offenses are not a manifestation of a paraphilic arousal pattern' — directly applicable to exhibitionistic offense conduct.*
> *DSM-5-TR: Criterion A for exhibitionistic disorder changed specifically to require the behavior be a manifestation of an atypical arousal pattern, not merely evidence that the behavior occurred.*

Q: *Marshall and Fernandez reviewed 10 phallometric studies of exhibitionists and found that 9 out of 10 showed that exhibitionists in clinical settings did not have a paraphilic preference for exposing themselves. Were you aware of this research when you made this diagnosis?*

- Purpose: Directly confronts the evaluator with the primary phallometric research undermining the diagnosis.
- Follow-up: Given that research, what is your evidentiary basis for concluding that my client's exhibitionistic conduct reflects an underlying atypical arousal pattern rather than opportunistic or situational behavior?
- Follow-up: Did you conduct PPG testing in this case? If not, how are you distinguishing disorder from behavior in the face of research showing most exhibitionists do not have the paraphilic arousal pattern?

3. Frotteuristic Disorder

DSM-5-TR Criterion A: At least six months of recurrent and intense sexual arousal from touching or rubbing against a nonconsenting person, as manifested by fantasies, urges, or behaviors. Criterion B: Has acted on the sexual urges with a nonconsenting person, or the urges or fantasies cause clinically significant distress or impairment.

Frotteuristic disorder faces a particularly severe diagnostic credibility problem: frotteuristic acts occur in up to 30% of adult males in the general population. This extraordinary prevalence rate — documented consistently in research — means that a

frotteuristic act is among the most common forms of minor sexual misconduct. The Merck Manual notes that frotteurism is one of the least studied of the major paraphilias, with no large studies of treatment approaches specific to the disorder. The forensic literature specifically identifies frotteurism as presenting one of the most significant Criterion A interpretation problems: the DSM-5-TR text statements suggest that 'frotteuristic behavior' alone is sufficient to establish the arousal pattern, but this interpretation is directly contradicted by the evidence and by the purpose of the revised Criterion A. (First (2014), Journal of AAPL.) Frotteuristic conduct in a crowded environment — a subway, bus, or concert — may have nothing to do with a paraphilic arousal pattern and everything to do with opportunistic behavior, impulsivity, or antisocial conduct.

> *DSM-5-TR / Merck Manual: Frotteuristic acts may occur in up to 30% of adult males in the general population — making the mere occurrence of such conduct an unreliable indicator of a paraphilic disorder.*
> *First, M.B. (2014), Journal of AAPL 42:191: Direct critique of frotteuristic disorder diagnosis — ambiguity in the DSM-5-TR text about whether 'frotteuristic behavior' requires the modifier to mean the behavior is a manifestation of a frotteuristic arousal pattern, which 'has limited bearing' on whether disorder exists.*
> *Johnson, Ostermeyer et al. (2014), Journal of AAPL 42(4):478: Systematic review of frotteurism in the community — establishes the high prevalence of frotteuristic acts in non-clinical populations, undermining the diagnostic significance of the conduct alone.*
> *First et al.: 'Forensic evaluators should endeavor to provide additional support for their inference' when diagnosing frotteuristic disorder and must rule out antisocial personality, opportunistic behavior, and substance intoxication as alternative explanations.*

Q: *Research establishes that frotteuristic acts occur in up to 30% of adult males in the general population. How do you distinguish a person who has engaged in frotteuristic conduct from a person who has Frotteuristic Disorder with a paraphilic arousal pattern?*

- Purpose: Forces acknowledgment of the high base rate of frotteuristic behavior in the general population.
- Follow-up: Did you conduct phallometric testing to objectively verify an atypical frotteuristic arousal pattern?
- Follow-up: Did you rule out that this conduct was opportunistic, antisocial, or substance-facilitated rather than driven by an atypical paraphilic arousal to nonconsenting touching specifically?
- Follow-up: The DSM-5-TR Criterion A for frotteuristic disorder requires the behavior be a manifestation of an atypical arousal pattern, not merely evidence that the conduct occurred. What specific evidence beyond offense history establishes the arousal pattern in this case?

4. Sexual Masochism Disorder

DSM-5-TR Criterion A: At least six months of recurrent and intense sexual arousal from being humiliated, beaten, bound, or otherwise made to suffer, as manifested by fantasies, urges, or behaviors. Criterion B: The fantasies, urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Sexual masochism disorder is the only paraphilic disorder in the DSM-5-TR that involves a nonconsenting victim only if Criterion B's distress/impairment prong is met — there is no Criterion B pathway via nonconsenting-victim conduct as there is for the courtship disorder diagnoses. This has an important forensic implication: for Sexual Masochism Disorder to qualify as an SVP predisposing mental disorder under WIC § 6600, it must be causally linked to likely future sexually violent predatory behavior, and the causation between masochistic arousal (desire to suffer) and perpetrating sexual violence against others is not self-evident. Moreover, research on paraphilias in the general population finds that interest in masochism — receiving pain or humiliation — is relatively common, with studies finding masochistic interest in 15.9% of respondents (StatPearls, 2023), undermining the diagnostic significance of such interest absent clinical impairment.

> *StatPearls (2023), NCBI: Fetishism, frotteurism, voyeurism, and masochism each showed prevalence of 15.9% (value considered statistically unusual) in a demographically representative population sample — demonstrating common occurrence of masochistic interests.*
> *DSM-5-TR: For Sexual Masochism Disorder, Criterion B requires that 'the fantasies, urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.' Unlike the courtship disorder diagnoses, there is no pathway to disorder through conduct with a nonconsenting victim.*
> *WIC § 6600(c): SVP qualifying mental disorder must predispose to the commission of criminal sexual acts. A diagnosis of masochism (desire to suffer) must be specifically connected to the commission of sexually violent acts against others — a causal link requiring explicit clinical explanation.*

Q: *Sexual Masochism Disorder involves sexual arousal from being humiliated or made to suffer — the patient is the recipient of pain, not the perpetrator. How does a diagnosis of Sexual Masochism Disorder predispose a person to commit sexually violent predatory acts against nonconsenting victims?*

- Purpose: Attacks the causal link between the masochistic arousal pattern and the predisposition to perpetrate sexually violent conduct, which is what WIC § 6600(c) requires.
- Follow-up: Is there clinical literature establishing that sexual masochism — as opposed

to sexual sadism — predisposes individuals to perpetrate violent sexual acts against others?

- Follow-up: Criterion B for Sexual Masochism Disorder requires clinically significant distress or impairment. What evidence of clinical distress or functional impairment did you identify in this client?
- Follow-up: Given that masochistic interests occur in approximately 15.9% of the general population, what distinguishes this client's interest from a common non-disordered variation in sexual interest?

5. Sexual Sadism Disorder

DSM-5-TR Criterion A: At least six months of recurrent and intense sexual arousal from the physical or psychological suffering of another person, as manifested by fantasies, urges, or behaviors. Criterion B: Has acted on the urges with a nonconsenting person, or the urges or fantasies cause marked distress or interpersonal difficulty.

Sexual sadism disorder is the most commonly misused diagnosis in rape cases. State evaluators have for decades applied a sexual sadism diagnosis to rapists based solely on the violence inherent in rape — ignoring the clinical requirement that the violence must be the specific source of sexual arousal, not merely instrumental in accomplishing the sexual act. Dr. Allen Frances's California DMH guidance specifically warned evaluators not to confuse 'violence inherent in all rapes with the sexually arousing use of violence that specifically defines the extremely rare DSM disorder of Sexual Sadism. Violence in rapes is ubiquitous — most often as an instrumental means of forcing the victim's compliance; sometimes also as an expression of anger or of substance-induced disinhibition.' The DSM-5-TR requires that the suffering itself be arousing — a specific, narrow clinical criterion that is not met by the presence of violence or aggression in a sexual assault.

Additionally, Sexual Sadism Disorder is described as extremely rare. The Merck Manual notes that individuals with sexual masochism or sadism disorder rarely present for treatment until someone becomes an unwilling partner or is injured, and that sadism as a paraphilic disorder is among the less common of the paraphilias clinically. The forensic literature documents that phallometric studies of rapists frequently do not confirm a sadistic arousal pattern, undermining diagnoses based solely on offense characteristics rather than objectively measured arousal.

> *Frances, A. (California DMH Guidance, Psychiatric Times): 'Do NOT confuse the violence inherent in all rapes with the sexually arousing use of violence that specifically defines the extremely rare DSM disorder of Sexual Sadism. Violence in rapes is ubiquitous — most often as an instrumental means of forcing the victim's compliance; sometimes also as an expression*

> *of anger or of substance-induced disinhibition.'*
> *DSM-5-TR: Sexual Sadism Disorder requires that the physical or psychological suffering of another person is itself sexually arousing — not merely that violence was used in the commission of a sexual offense.*
> *Wakefield (2011), Int'l J.L. & Psychiatry 34:195: Documents the widespread misapplication of Sexual Sadism in SVP evaluations based on the violence of the offense rather than objective evidence of sadistic arousal.*
> *Merck Manual: Sexual sadism disorder is uncommon; true sadistic arousal patterns are rarely seen in clinical settings outside of very specific presentations where suffering is the necessary condition for arousal.*

Q: *For Sexual Sadism Disorder, the criterion is that suffering itself is sexually arousing — not that the person was violent during the assault. What specific evidence in this case establishes that my client was sexually aroused specifically by the victim's suffering, as opposed to being motivated by hostility, power, desire for compliance, or other non-paraphilic factors?*

- Purpose: Forces the evaluator to distinguish the specific sadistic arousal pattern from ordinary sexual assault aggression.
- Follow-up: Did you conduct phallometric testing to objectively measure whether sadistic stimuli produced greater arousal than non-sadistic stimuli?
- Follow-up: The California Department of Mental Health's own guidance explicitly warns evaluators not to confuse instrumental violence in rape with the arousal to suffering that defines sadism. Were you aware of that guidance?
- Follow-up: If the violence in the offense was used to force victim compliance rather than because suffering itself was arousing, does that meet Criterion A for Sexual Sadism Disorder under the DSM-5-TR?

6. Pedophilic Disorder

DSM-5-TR Criterion A: Over a period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger). Criterion B: The person has acted on the urges, or is markedly distressed or impaired by the urges and fantasies. Criterion C: The person is at least 16 years old and at least 5 years older than the child(ren) — with an exception excluding an older adolescent in an ongoing relationship with a 12- or 13-year-old.

Pedophilic disorder is the most well-established and least clinically controversial of the eight paraphilias — but it is also the most commonly misapplied. The central diagnostic challenge in SVP proceedings is the hebephilia confusion: pedophilic disorder applies only to prepubescent children (generally age 13 or younger per DSM-5-TR). Attraction

to pubescent adolescents — known as hebephilia — was proposed for inclusion as a named diagnosis in DSM-5 and explicitly rejected by the APA. Hebephilia is not a DSM-5-TR diagnosis. Where an evaluator has assigned a pedophilic disorder diagnosis based on victims who were 14, 15, 16, or 17 years old — or who were pubescent rather than prepubescent — the diagnosis is clinically invalid.

The interrater reliability problem for pedophilic disorder is also significant. A major study by Seto et al. (2016) tested the inter-rater reliability of DSM-IV-TR pedophilia diagnosis in a sample of 79 men, finding a kappa of only .59 — a 'moderate' reliability rating that is insufficient for a diagnosis with life-altering civil commitment consequences. Additionally, research consistently documents that the DSM-5-TR criteria for pedophilic disorder 'perpetuate the risk that the diagnosis of pedophilic disorder will be made solely on the basis of criminal behavior' (First (2014), Journal of AAPL) because the correction to Criterion A requiring behavior be a manifestation of an arousal pattern was not incorporated into the pedophilic disorder criteria.

> *Blanchard et al. (2009), Archives of Sexual Behavior: Hebephilia (attraction to pubescent children, roughly ages 11–14) is a discriminable erotic age preference from pedophilia but was explicitly rejected by the APA for inclusion in DSM-5.*
> *Seto et al. (2016), ScienceDirect: Interrater reliability of DSM-IV-TR pedophilia diagnosis: kappa of .59 — described as 'moderate' — in a 79-person forensic sample; proposed DSM-5 pedohebephilia criteria kappa of .52.*
> *First, M.B. (2014), Journal of AAPL 42:191: 'The corrections to Criterion A have not been incorporated into the DSM-5 criteria for pedophilic disorder, thus perpetuating the risk that the diagnosis of pedophilic disorder will be made solely on the basis of criminal behavior.'*
> *DSM-5-TR: Pedophilic disorder criterion specifies 'prepubescent' children, generally age 13 or younger. For older adolescents age 17–18 who have ongoing relationships with 12–13-year-olds, the disorder may not apply.*
> *Matter of State v. Ralph P. (2016 NY Slip Op 26252): Court analysis of hebephilia in SVP proceedings — noting that SVP evaluators almost never have victim Tanner stage information, making precise distinction between pedophilia and hebephilia difficult to establish.*

Q: *Is Pedophilic Disorder under the DSM-5-TR limited to prepubescent children — generally those age 13 or younger?*

- Purpose: Establishes the clinical threshold and opens the door to the hebephilia challenge if any victims were adolescents.
- Follow-up (if victims were 14+): The victims in this case were [ages]. Are children who are 14, 15, or 16 years old typically prepubescent under the DSM-5-TR definition?
- Follow-up: Hebephilia — attraction to pubescent adolescents ages 11–14 — was proposed for DSM-5 and explicitly rejected by the APA. Is hebephilia a named diagnosis in the DSM-5-TR?
- Follow-up: If the client's offenses involved pubescent adolescents rather than

prepubescent children, can you diagnose Pedophilic Disorder under the DSM-5-TR without misusing the diagnostic criteria?

- Follow-up on interrater reliability: Research on the reliability of pedophilic disorder diagnoses in forensic settings shows kappa values of approximately .52 to .59 — moderate at best. Does your evaluation document that level of diagnostic reliability, and is moderate reliability sufficient to justify indefinite civil commitment?
- Follow-up: Did you conduct phallometric testing to objectively confirm prepubescent arousal? If not, what objective basis distinguishes disorder from offense conduct in this case?

7. Fetishistic Disorder

DSM-5-TR Criterion A: At least six months of recurrent and intense sexual arousal from either use of nonliving objects or a highly specific focus on nongenital body part(s), as manifested by fantasies, urges, or behaviors. Criterion B: The fantasies, urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. Criterion C: Fetish objects are not limited to articles of clothing used in cross-dressing (distinguishing from Transvestic Disorder) or devices designed for genital stimulation.

Fetishistic disorder is among the most unusual diagnoses in the SVP context because it involves nonliving objects or nongenital body parts — categories that do not inherently involve nonconsenting victims. For a fetishistic disorder diagnosis to support SVP commitment, the evaluator must establish a specific causal chain: the fetishistic arousal pattern must predispose the person to commit sexually violent predatory criminal acts. This causal linkage is far from self-evident and requires specific clinical explanation. Statistically, fetishistic interest is extraordinarily common — research shows fetishistic interest in approximately 15.9% of the general population (StatPearls, 2023). Criterion B requires clinically significant distress or functional impairment, not merely the existence of the interest, which must be demonstrated in the evaluation.

> *StatPearls (2023), NCBI: Fetishistic interest estimated at 15.9% prevalence in a demographically representative sample — confirming that fetishistic interests are common in the general population and do not themselves constitute disorder.*
> *DSM-5-TR: Fetishistic Disorder Criterion B requires clinically significant distress or impairment in social, occupational, or other important areas of functioning — there is no pathway to disorder through nonconsenting victim conduct as there is for the courtship disorder diagnoses.*
> *WIC § 6600(c): The qualifying mental disorder must predispose the person to sexually violent predatory criminal acts. A fetish for inanimate objects must be clinically linked to violent sexual conduct against persons — a connection requiring specific, non-circular clinical explanation.*

Q: *Fetishistic Disorder involves arousal to nonliving objects or nongenital body parts. How does this arousal pattern predispose a person to commit sexually violent predatory criminal acts against nonconsenting persons?*

- Purpose: Attacks the causal linkage between the fetish arousal pattern and sexually violent predatory conduct.
- Follow-up: Criterion B for Fetishistic Disorder requires clinically significant distress or impairment in functioning. What evidence of clinical distress or functional impairment is documented in this evaluation?
- Follow-up: Research shows fetishistic interests in approximately 15.9% of the general population. What distinguishes this client's interest from a common non-disordered variation?

8. Transvestic Disorder

DSM-5-TR Criterion A: At least six months of recurrent and intense sexual arousal from cross-dressing, as manifested by fantasies, urges, or behaviors. Specifiers: With fetishism (if aroused by fabrics, materials, or garments); with autogynephilia (if aroused by thoughts or images of oneself as female). Criterion B: The fantasies, urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Transvestic disorder is essentially absent from the SVP commitment context for a straightforward reason: cross-dressing involves no nonconsenting victim, produces no sexual violence, and requires demonstration of significant clinical distress or impairment under Criterion B. There is no pathway from Transvestic Disorder to sexually violent predatory conduct unless the evaluator constructs a highly specific — and clinically unsupported — causal chain. If an evaluator has included Transvestic Disorder in the diagnostic formulation, it is almost certainly being used as a supplemental diagnosis to bolster another qualifying condition rather than as an independent basis for SVP commitment. The DSM-5-TR removed the DSM-IV restriction limiting the diagnosis to heterosexual males, opening the criteria to all persons — but the fundamental requirement of distress or impairment remains, and there is no nonconsenting victim pathway to disorder.

> *DSM-5-TR: Transvestic Disorder requires Criterion B — clinically significant distress or impairment — with no pathway to disorder through nonconsenting victim conduct. Cross-dressing without distress or impairment is not a disorder.*
> *DSM-5-TR: The diagnosis was modified from DSM-IV, which limited it to heterosexual males; DSM-5 removed this restriction. However, 'the requirement remains that individuals must*

> *experience significant distress or impairment because of their behavior.'*
> *WIC § 6600(c): A qualifying mental disorder must predispose to sexually violent predatory criminal acts. Transvestic Disorder with no nonconsenting victim component requires specific clinical explanation of how cross-dressing arousal predisposes to sexual violence — an explanation rarely provided.*

Q: *Transvestic Disorder involves cross-dressing and does not require any nonconsenting victim for the diagnosis. How does Transvestic Disorder predispose a person to commit sexually violent predatory criminal acts under WIC § 6600(c)?*

- Purpose: Forces the evaluator to explain the causal link between transvestic arousal and sexual violence — a link that rarely exists clinically.
- Follow-up: Is there clinical literature establishing a causal relationship between transvestic arousal and the perpetration of sexually violent predatory acts?
- Follow-up: Criterion B requires 'clinically significant distress or impairment in social, occupational, or other important areas of functioning.' What specific documented distress or impairment does your evaluation identify in this client?

e. Consolidating the Challenge: Strategic Use of All Lines of Attack

The challenge to a paraphilic disorder diagnosis in an SVP proceeding should operate on multiple simultaneous levels. The attorney should never limit the challenge to a single line of attack. The following is the recommended sequence of challenge layers, applicable in every case.

LEVEL 1 — THE THRESHOLD CHALLENGE: IS THE DIAGNOSIS A RECOGNIZED DSM-5-TR CATEGORY?

If the diagnosis is 'Paraphilia NOS,' 'Other Specified Paraphilic Disorder,' or bare 'Paraphilia': Attack the diagnosis as facially invalid under *Smith* (2022) 75 Cal.App.5th 322 and under the DSM-5-TR's explicit recognition that residual categories lack the utility and validity of the eight named diagnoses.

If the diagnosis labels a concept repeatedly rejected by the DSM (nonconsent, paraphilic rape, hebephilia): Document the five separate DSM rejections and the scholarly consensus that these are not recognized diagnostic entities.

If the diagnosis is a named DSM-5-TR category: Proceed to Level 2.

LEVEL 2 — CRITERION A CHALLENGE: IS THE AROUSAL PATTERN ESTABLISHED?

The behavior alone does not establish Criterion A. Force the evaluator to identify specific, objective evidence of the atypical arousal pattern beyond offense history.

Ask whether phallometric testing (PPG/ABEL/AASI-3) was conducted and what the results showed. Cross-examine on the specific results — methodology, reliability, scoring.

If no objective testing: The evaluator has made a diagnosis based on conduct alone, which the DSM-5-TR Criterion A revision was specifically designed to prevent.

Identify the specific research for this diagnosis that undermines conduct-based diagnosis (Marshall & Fernandez for exhibitionistic disorder; the 30% prevalence rate for frotteurism; the 42% voyeuristic behavior rate for voyeurism; the hebephilia problem for pedophilic disorder).

LEVEL 3 — CRITERION B CHALLENGE: IS THE DISORDER THRESHOLD MET?

For diagnoses not involving nonconsenting victims (Sexual Masochism, Fetishistic, Transvestic): No nonconsenting victim pathway exists. Distress or impairment must be specifically documented.

For diagnoses involving nonconsenting victims (Voyeuristic, Exhibitionistic, Frotteuristic, Sexual Sadism, Pedophilic): The acting-on-urges pathway to Criterion B creates a circularity risk — the offense becomes the proof of both the arousal pattern and the disorder, without independent clinical support.

Challenge the evaluator to articulate the specific Criterion B evidence beyond the existence of criminal convictions.

LEVEL 4 — THE CAUSAL LINK CHALLENGE: IS THE DISORDER PREDISPOSING?

WIC § 6600(c) requires that the mental disorder predispose the person to the commission of criminal sexual acts. The diagnosis must predispose to future sexually violent predatory conduct.

Challenge the evaluator to explain the causal mechanism — how does this specific arousal pattern, in this specific individual, operate to predispose sexually violent behavior?

For masochistic, fetishistic, and transvestic disorders, the causal link to perpetrating sexual violence is especially weak and must be specifically challenged.

Kansas v. Crane (2002) 534 U.S. 407: The disorder must cause 'serious difficulty controlling behavior' — not just establish an unusual arousal pattern. The diagnosis alone does not satisfy this constitutional requirement.

LEVEL 5 — THE DSM DISCLAIMER CHALLENGE

Confront every evaluator with DSM-5-TR page xxiii: 'A clinical diagnosis is not sufficient to establish the existence for legal purposes of a mental disorder.'

Follow-up: 'Having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.'

These two sentences from the DSM's own introduction effectively require that an SVP evaluator go beyond the diagnosis to demonstrate specific, individualized volitional impairment — something most DSH evaluations fail to do independently of the diagnostic conclusion.

f. Case Law and Authority Reference Summary

CALIFORNIA CASE LAW

People v. Smith (2022) 75 Cal.App.5th 322: 'Other Specified Paraphilia' held invalid as basis for SVP commitment. Reinforces that residual paraphilia categories cannot substitute for recognized named DSM diagnoses in SVP proceedings.

People v. Smith (2020) 49 Cal.App.5th 445: Prior history — SVP commitment requires a diagnosed mental disorder making person likely to engage in sexually violent criminal behavior; diagnosis must be valid.

People v. Williams (2003) 31 Cal.4th 757: Confirming that SVPA language satisfies Crane's volitional impairment standard — but noting the mental disorder must actually predispose the person to criminal sexual acts.

WIC § 6600(c): The qualifying mental disorder is a 'congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace.'

FEDERAL / SUPREME COURT LAW

Kansas v. Hendricks (1997) 521 U.S. 346: SVP commitment requires a mental disorder — not everyday criminality. The disorder must produce 'volitional impairment rendering them dangerous beyond their control.'

Kansas v. Crane (2002) 534 U.S. 407: 'There must be proof of serious difficulty in controlling behavior' — the constitutional minimum for SVP commitment.

Foucha v. Louisiana (1992) 504 U.S. 71: Cannot civilly confine someone merely because they are dangerous; there must be a qualifying mental disorder.

k. Non-Sexual Paraphilic Diagnosis

Challenging Non-Paraphilic Mental Disorder Diagnoses Used as SVP Qualifying Conditions: Antisocial Personality Disorder, Bipolar Disorder, Substance Use Disorder, and Related Conditions

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I. Overview: The Non-Paraphilic Diagnosis Problem and the Nexus Requirement

In SVP proceedings, the qualifying mental disorder is not simply any diagnosis a forensic evaluator chooses to assign. The California SVPA requires a 'diagnosed mental disorder' defined under WIC § 6600(c) as 'a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.' This definition contains several distinct components that must each be satisfied — and all of them must be proven in the specific individual case, not merely assumed from the diagnosis alone.

The problem addressed in this section is a pattern of DSH evaluations that diagnoses a respondent with a non-paraphilic mental condition — Antisocial Personality Disorder (ASPD), Bipolar Disorder, Substance Use Disorder, or another non-sexual psychiatric condition — and then recites that this diagnosis constitutes a qualifying mental disorder and predisposes the individual to sexually violent conduct, without providing the specific clinical reasoning establishing the causal nexus between the diagnosis and sexualized volitional impairment. This is insufficient as a matter of law and a matter of clinical methodology.

The core problem is this: the mere existence of a diagnosis, standing alone, does not establish the nexus. An evaluator who diagnoses ASPD and says 'this predisposes him to commit sexually violent acts' without explaining why this individual's particular ASPD

— as opposed to general criminality — specifically produces a predisposition to sexually violent conduct rather than to other forms of antisocial behavior, has failed to provide the constitutional minimum. The same is true for Bipolar Disorder (why does mania produce sexually violent predatory conduct in this individual rather than other impulsive behavior?) and for Substance Use Disorder (why does this person's drug use specifically predispose to sexual violence rather than other substance-facilitated conduct?).

THE THREE-PART NEXUS THAT MUST BE PROVEN FOR EVERY NON-PARAPHILIC DIAGNOSIS

Nexus Element 1 — The Diagnosis Must Affect Emotional or Volitional Capacity: The mental condition must cause an identified impairment in the individual's capacity to control behavior or in the individual's emotional functioning relevant to sexual conduct. The diagnosis alone does not establish this — the evaluator must identify the specific way this person's condition impairs their volitional or emotional functioning.

Nexus Element 2 — That Impairment Must Predispose to Sexually Violent Criminal Acts: The emotional or volitional impairment must specifically predispose the individual to commit acts that are both sexual and violent, not simply criminal conduct generally, not simply sexual conduct, and not simply aggressive conduct. The predisposition must be to the specific combination: sexually violent predatory acts.

Nexus Element 3 — The Predisposition Must Distinguish This Person From the Ordinary Recidivist: Under *Kansas v. Crane* (2002) 534 U.S. 407, the mental disorder must distinguish the dangerous sexual offender from the 'dangerous but typical recidivist.' An evaluator who relies on a diagnosis that describes general criminality (like ASPD) or general impulsivity (like Bipolar Disorder) without explaining why this individual is distinguished from the typical criminal recidivist has failed to satisfy this constitutional requirement.

THE FOUNDATIONAL LEGAL AND CLINICAL AUTHORITY: THE CO-OCCURRENCE RULE

Rogers & Shuman (2005), cited in JAAPL: 'The simple co-occurrence of a clinical condition and lack of volitional control is insufficient. The crucial question is whether the clinical condition causes the lack of control. This nexus cannot be inferred from diagnoses.'

DSM-5-TR, p. xxiii: 'A clinical diagnosis is not sufficient to establish the existence for legal purposes of a mental disorder' and 'having the diagnosis in itself does not

demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.'

Kansas v. Crane (2002) 534 U.S. 407: 'There must be proof of serious difficulty in controlling behavior.' The mental disorder must cause the individual to have serious difficulty controlling sexually violent behavior — not criminal behavior generally.

Kansas v. Hendricks (1997) 521 U.S. 346: The mental disorder must produce 'volitional impairment rendering [the person] dangerous beyond their control.' This distinguishes SVP commitment from ordinary criminal recidivism.

Scurich, Martinez & Krauss (2025), Law and Human Behavior: Documents that volitional impairment is 'central to SVP commitment' but that forensic professionals demonstrate 'substantial, often contradictory, variability in expert conclusions' and that the construct is conceptualized inconsistently across practitioners.

II. Antisocial Personality Disorder (ASPD): The General Criminality Problem

a. What ASPD Is and Why It Is Constitutionally Problematic as an SVP Qualifying Diagnosis

Antisocial Personality Disorder is characterized in the DSM-5-TR by a pervasive pattern of disregard for and violation of the rights of others, occurring since age 15, manifested by three or more of the following: failure to conform to social norms regarding lawful behaviors, deceitfulness, impulsivity, irritability and aggressiveness, reckless disregard for safety, consistent irresponsibility, and lack of remorse for harming others. There is a critical problem for SVP purposes: these criteria describe general criminal and antisocial behavior — not a specific predisposition to sexual violence. ASPD is the most common diagnosis in the prison population, present in approximately 40–70% of incarcerated individuals. Its near-universal prevalence in criminal populations is precisely what makes it constitutionally suspect as an SVP qualifying diagnosis.

The Model Penal Code expressly excluded ASPD from qualifying mental conditions in insanity defense contexts, stating that 'the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.' (ALI Model Penal Code § 4.01.) While the MPC exclusion does not directly govern California SVP proceedings, it reflects the longstanding concern in law and psychiatry that a diagnosis defined primarily by criminal behavior should not serve as the legal justification for preventive psychiatric detention. The constitutional concern is sharpest in SVP cases: if a diagnosis present in 40–70% of the prison population can qualify

someone as an SVP, the distinction between SVP commitment and ordinary sentencing becomes illusory.

> *People v. Gudino (unpublished California SVP case): ASPD was rejected as a qualifying SVP diagnosis because the state failed to prove a lack of impulse control (the volitional prong) that predisposed the person specifically to commit sexual criminal acts due to ASPD. The court did not reject ASPD per se — it rejected the failure to establish the specific nexus to sexual violence.*
> *Vognsen & Phenix (2004), Journal of AAPL 32(4):440: 'A clear sexual disorder must be present before a person can be found to be an SVP/SDP, and a diagnosis of antisocial personality disorder is not enough.' The contrasting view is that ASPD 'overlaps almost completely with common criminality, holds only a very marginal place in psychiatric diagnosis, never serves as grounds for civil psychiatric commitment, and is never considered a valid psychiatric diagnosis for this purpose.'*
> *Sreenivasan et al. (2020), Journal of AAPL: ASPD 'is a polythetic diagnosis with no specific combination of criteria to establish it; two individuals can have the same disorder but may not share diagnostic features.' ASPD criteria 'do not include terms such as predisposition to deviant sexual behavior or volitional or emotional impairment' — central elements of the SVP statutory definition.*
> *Kansas v. Crane (2002) 534 U.S. 407: The SVP mental disorder must 'distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist.'*
> *Model Penal Code § 4.01: 'The terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.' ASPD is paradigmatically defined by repeated criminal and antisocial conduct.*
> *Perillo et al. (2014), Int'l J.L. & Psychiatry 37:190: Documents the problematic use of ASPD in SVP evaluations — ASPD is less viable when 'manifested primarily by criminal behavior, the sex crimes are situational in context (e.g., substance abuse, negative peer affiliation), or the disorder cannot be linked to future sexual offending.'*

b. What the Evaluator Must Establish — But Usually Doesn't

For ASPD to validly serve as an SVP qualifying disorder, the evaluator must move beyond a recitation of the ASPD criteria and provide specific clinical reasoning establishing: (1) that this individual's ASPD specifically impairs the volitional or emotional capacity relevant to sexual conduct, not just criminal conduct in general; (2) that the pattern of sexual offending is atypical and severe, not situational or opportunistic; (3) that there is a specific causal mechanism by which the ASPD features produce sexually violent predatory behavior; and (4) that this individual is distinguishable from the typical criminal recidivist who also has ASPD but is not an SVP.

Research on ASPD in SVP evaluations identifies specific features that may support the nexus when they are present: severe and compulsive sexual offending patterns with multiple unrelated victims; sexual aggression that is not explained by other factors such as substance intoxication, peer pressure, or opportunism; and paraphilia-like behavioral

patterns even if a formal paraphilia diagnosis is not assigned. ASPD is more viable as a qualifying disorder when these atypical features are present. Conversely, ASPD is not viable when the sexual offenses are situational, the sexual offending represents only one aspect of a broader pattern of general criminality, or the specific connection to sexually violent predatory conduct is asserted rather than explained.

CROSS-EXAMINATION PATH FOR ANTISOCIAL PERSONALITY DISORDER

- Q: Is it true that ASPD is present in approximately 40–70% of the incarcerated population in the United States? If so, how does ASPD distinguish my client from the typical criminal recidivist as required by Kansas v. Crane?
- Q: The DSM-5-TR criteria for ASPD include failure to conform to social norms, deceitfulness, impulsivity, aggression, reckless disregard for safety, irresponsibility, and lack of remorse. Which of these specific criteria, in your clinical opinion, specifically predispose a person to sexually violent conduct rather than to other forms of criminal or antisocial behavior?
- Q: Research by Sreenivasan et al. (2020) states that ASPD 'criteria do not include terms such as predisposition to deviant sexual behavior or volitional or emotional impairment.' Were you aware of that when you concluded ASPD predisposes my client to sexually violent conduct?
- Q: Can you explain the specific clinical mechanism by which my client's ASPD impairs his volitional capacity specifically with respect to sexually violent predatory acts, as opposed to his general capacity to conform to the law?
- Q: People v. Gudino, a California SVP case, held that ASPD was not a qualifying diagnosis because the state failed to prove a lack of impulse control predisposing specifically to sexual criminal acts. How did your evaluation establish that specific nexus, beyond the fact that my client has an ASPD diagnosis and has committed sexual offenses?
- Q: The Model Penal Code states that 'mental disease or defect does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.' Is ASPD, at its core, a diagnosis defined by repeated criminal and antisocial conduct?
- Q: You stated that ASPD predisposes my client to commit sexually violent criminal acts. What specifically in the ASPD diagnostic criteria causes or explains a predisposition to sexual violence as opposed to violence generally, theft, fraud, or other antisocial conduct?

III. Bipolar Disorder: The Episode-Specific, Nexus-Deficient Diagnosis

a. What Bipolar Disorder Is and the Theoretical SVP Argument

Bipolar Disorder (Bipolar I and Bipolar II) is characterized by mood episodes — manic, hypomanic, and depressive — that cause significant functional impairment. The DSM-5-TR criteria for a manic episode include elevated or expansive or irritable mood lasting at least one week, with increased energy and at least three of: grandiosity, decreased sleep, pressured speech, racing thoughts, distractibility, increased goal-directed activity, and impulsive or risky behavior. Hypersexuality — an abnormally heightened interest in sexual activity — is specifically listed as one of the hallmark features of mania in both the DSM-5-TR and ICD-10. The theoretical argument for Bipolar Disorder as an SVP qualifying diagnosis rests on this hypersexuality feature: that during manic episodes, the individual becomes so sexually disinhibited that he loses volitional control over sexually violent conduct.

Forensic evaluators sometimes argue that mania-induced hypersexuality caused or contributed to sexual offending — particularly if the offense occurred during a documented manic episode. Some courts and commentators have acknowledged this as a theoretically viable argument. However, the gap between the theory and a valid SVP qualifying diagnosis is substantial, and the failure to close that gap in the evaluation is both a legal and scientific deficiency.

> *Garrick, Frayne & Hulse (2008), Journal of AAPL 36(3):375: 'Mania and attendant hypersexuality may be a driving element in repetitive sexually assaultive behavior. An individual in a manic state may consistently become sexually disinhibited and force others into sexual activity or choose children as sexual targets. In such instances, bipolar disorder could be argued as representing a qualifying mental disorder for an SVP/SDP commitment.' (Emphasis: the authors frame this as what 'could be argued' — not an established principle.)*
> *Kopeykina et al. (2016) review, cited in Int'l J Bipolar Disorders (2023): 'During mania, individuals with BD have more risky sexual behavior compared to other psychiatric patients.' However, hypersexuality is 'not systematically defined' and the construct 'was not consistent across studies.' The 'existing literature is mostly outdated and lacks a consistent definition of hypersexuality.'*
> *Dolman et al. (2024): 'Hypersexuality in bipolar disorder: An overlooked symptom' — documents that hypersexuality is rarely systematically discussed and poorly studied. Little research directly links mania-induced hypersexuality to nonconsensual or violent sexual conduct.*
> *Psychiatric Times (2025): In persons with mental illness, 'deviant sexual interest may be related to the hypersexuality of a manic phase in bipolar disorder.' But this remains a clinical observation, not a validated clinical pathway from bipolar diagnosis to SVP-qualifying mental disorder.*
> *DSM-5-TR: Hypersexuality is listed as one of the seven possible symptoms of mania, only one of which need be present along with elevated mood. The diagnosis does not require hypersexuality — and even when present, hypersexuality manifests as increased interest in consensual sexual activity, risky sexual behavior, or sexual indiscretions, not nonconsensual*

> *predatory sexual violence.*

b. Why the Bipolar Diagnosis Usually Fails the Nexus Test

There are multiple independent reasons why a Bipolar Disorder diagnosis, standing alone or without specific individualized clinical reasoning, fails to establish the SVP qualifying nexus.

First, the episode-specific problem: Bipolar Disorder is characterized by episodic symptoms. Manic episodes are time-limited and typically last days to weeks. SVP commitment is not offense-specific — it requires that the person currently has a mental disorder that currently predisposes to future sexually violent conduct. An evaluator who relies on bipolar disorder must explain how the disorder currently produces volitional impairment with respect to sexually violent behavior at the time of the commitment hearing, not merely that mania existed at the time of past offenses.

Second, the hypersexuality-to-sexual-violence gap: Even if a manic episode produces hypersexuality, the gap between hypersexuality (increased sexual interest) and sexually violent predatory conduct is not automatic. Most individuals who experience mania-induced hypersexuality engage in consensual risky sexual behavior, not sexual assault. For the bipolar diagnosis to support SVP commitment, the evaluator must explain the specific mechanism by which hypersexuality in this individual produces nonconsensual sexually violent predatory conduct specifically — not simply increased sexual interest generally.

Third, the treatment-stabilization problem: Unlike paraphilic disorders, Bipolar Disorder is well-established as a treatable condition with mood-stabilizing medications including lithium, valproate, and antipsychotics. If the individual has been medicated and symptomatically stable, the predisposition to manic-driven sexual violence may be eliminated or substantially reduced. An evaluator who fails to address current medication compliance and symptom stability has failed to assess current predisposition.

Fourth, the data problem: The research literature does not establish a reliable causal pathway from Bipolar Disorder to sexually violent predatory conduct. The existing literature on bipolar disorder and sexuality primarily documents increased risky consensual sexual behavior during mania, not nonconsensual sexually violent acts. A 2016 review found only three recent studies on hypersexuality and bipolar disorder — two cross-sectional studies and one case report — and described the literature as outdated with no consistent definition of hypersexuality. This is not sufficient scientific support for an SVP qualifying conclusion.

CROSS-EXAMINATION PATH FOR BIPOLAR DISORDER

- Q: A diagnosis of Bipolar Disorder requires episodic mood symptoms — manic or hypomanic episodes, and depressive episodes. SVP commitment must be based on a current mental disorder that currently predisposes to future sexually violent conduct. Is my client currently in a manic or hypomanic episode? If not, how does Bipolar Disorder currently predispose him to sexually violent conduct?
- Q: Bipolar Disorder is a treatable condition. My client is currently receiving mood-stabilizing medication. If the disorder is being treated and symptoms are controlled, how does it currently produce the volitional impairment required for SVP commitment?
- Q: The research on hypersexuality in bipolar disorder — a 2016 literature review — found only three recent studies, described the existing literature as mostly outdated, and noted no consistent definition of hypersexuality. What specific research establishes that mania-induced hypersexuality produces nonconsensual sexually violent predatory conduct rather than risky consensual sexual behavior?
- Q: Most people who experience mania-induced hypersexuality engage in consensual risky sexual activity — not sexual assault. What specific clinical factor in my client explains why his hypersexuality during mania manifests as sexually violent predatory conduct rather than consensual risky behavior?
- Q: Is hypersexuality itself a symptom of mania, or does mania require hypersexuality? If hypersexuality is optional — only one of seven possible criteria — what specific evidence establishes that hypersexuality rather than another manic symptom is the mechanism linking my client's bipolar disorder to sexual violence?
- Q: Explain the specific causal chain from my client's Bipolar Disorder diagnosis to the commission of sexually violent predatory acts. Not generally — specifically, in this individual, how does this diagnosis produce the volitional impairment required by WIC § 6600(c)?
- Q: Is Bipolar Disorder present in approximately 2.8% of the U.S. adult population? Of that 2.8%, what proportion commit sexually violent predatory acts? What does that say about whether Bipolar Disorder predisposes to sexually violent conduct in the general sense?

IV. Substance Use Disorder and Addiction: The Voluntary Intoxication and Nexus Problems

a. What Substance Use Disorder Is and Why It Is Particularly Problematic in SVP Proceedings

Substance Use Disorder (SUD) — which replaced the former DSM diagnoses of Substance Abuse and Substance Dependence — is defined in the DSM-5-TR as a problematic pattern of substance use leading to clinically significant impairment or distress, characterized by impaired control over use, social impairment, risky use, and pharmacological symptoms (tolerance and withdrawal). The key point for SVP purposes is that SUD is fundamentally defined by the compulsive use of substances — not by any predisposition to sexually violent conduct. The compulsion in SUD is a compulsion to use drugs or alcohol, not a compulsion to engage in sexual violence.

Evaluators who use SUD as an SVP qualifying diagnosis face several fundamental problems. First, the intoxication-offense argument is self-defeating: if the sexual offense was committed during intoxication, the intoxication was the proximate cause of the offense, not a volitional impairment from the disorder itself. Voluntary intoxication is generally not a defense to criminal conduct and does not constitute the kind of volitional impairment from a mental disorder that SVP statutes require. Second, if SUD is cited as predisposing to sexual violence because the individual commits sexual offenses when intoxicated, this conflates substance-facilitated opportunistic conduct with the disorder-driven volitional impairment that Hendricks and Crane require. Third, unlike paraphilic disorders, SUD is treatable — sobriety addresses the chemical basis of the disorder, raising the question of whether a person in sustained remission has the ongoing predisposition required for commitment.

> *Garrick et al. (2008), Journal of AAPL 36(3):375: 'Substance abuse and intoxication represent another class of disorders that may warrant a designation as an SVP/SDP mental disorder diagnosis' — but only when the substance use can be causally linked to sexually violent predatory conduct through a specific mechanism, not merely temporal co-occurrence.*
>
> *NIDA (National Institute on Drug Abuse): 'The initial decision to take drugs is generally voluntary. However, with continued use, a person's ability to exert self-control can become seriously impaired.' This voluntary-to-compulsive continuum creates a complex problem for volitional impairment analysis in SVP cases — the compulsion is toward substance use, not toward sexual violence.*
>
> *DSM-5-TR: The 11 diagnostic criteria for Substance Use Disorder include impaired control over use, time spent obtaining the substance, craving, failure to fulfill obligations, social problems, giving up activities, risky use, continued use despite problems, tolerance, and withdrawal. None of these criteria establish a predisposition to sexually violent conduct.*
>
> *Merck Manual: 'Intoxication refers to development of a reversible substance-specific syndrome of mental and behavioral changes' — including 'impaired judgment' and 'impaired physical and social functioning.' Intoxication is temporary and reversible, not the persistent volitional impairment SVP statutes require.*

> *NCBI (Common Comorbidities with Substance Use Disorders): 'The intoxicating effects of many drugs can alter judgment and inhibition, and lead people to engage in impulsive and unsafe behaviors.' Impulsive unsafe behaviors under intoxication describe general disinhibited conduct — not specifically sexually violent predatory behavior.*
> *Rogers & Shuman (2005), cited in JAAPL: The nexus 'cannot be inferred from diagnoses' — it must be specifically established that the clinical condition causes the lack of volitional control over the specific conduct at issue.*

b. The Four Arguments Against SUD as an SVP Qualifying Diagnosis

The following four independent arguments should be raised when challenging a Substance Use Disorder diagnosis as an SVP qualifying condition. Each can succeed independently; together they present a compelling challenge.

ARGUMENT 1 — THE VOLUNTARY INTOXICATION PROBLEM

If the sexual offense was committed while the client was intoxicated on drugs or alcohol, the proximate mechanism was the acute intoxication — a voluntary state — not the chronic SUD disorder itself. Voluntary intoxication does not constitute the kind of mental disorder-driven volitional impairment that SVP statutes require.

Kansas v. Hendricks (1997): SVP commitment requires a mental disorder that produces volitional impairment 'rendering [the person] dangerous beyond their control.' A person who can avoid sexual offending simply by not using substances has not lost volitional control over sexually violent behavior — they have retained volitional control over their substance use, which in turn affects their behavior.

The cross-examination question: If my client simply refrains from using drugs or alcohol, does he have a predisposition to commit sexually violent predatory acts? If not, isn't the disorder's relationship to sexual violence contingent on a voluntary behavior — substance use — rather than on an independent loss of volitional control?

ARGUMENT 2 — THE COMPULSION MISMATCH PROBLEM

SUD creates a compulsion to use substances — not a compulsion to engage in sexually violent conduct. Even accepting that SUD impairs volitional capacity, the specific volitional impairment is over substance use. The connection to sexual violence is indirect, mediated by intoxication, and not inherent in the disorder itself.

The evaluator must explain the specific clinical mechanism by which the compulsion to use substances specifically produces volitional impairment over sexually violent conduct, as opposed to producing impairment over the choice to use substances.

Without this specific mechanism, the evaluator has established only that SUD produces intoxication, and that the client committed a sexual offense while intoxicated — a temporal correlation that does not establish the causal nexus required by WIC § 6600(c).

ARGUMENT 3 — THE REMISSION AND TREATABILITY PROBLEM

SUD is one of the most well-established treatable conditions in psychiatry. Extended sobriety — particularly when achieved through residential treatment, medication-assisted treatment (MAT), and community support — substantially reduces or eliminates the disinhibiting effects of substance use.

An evaluator who diagnoses SUD as an SVP qualifying disorder without addressing current sobriety status, time since last use, participation in treatment, and whether the disorder is currently in remission has failed to assess current predisposition.

The DSM-5-TR defines 'early remission' for SUD as no criteria met for 3–12 months, and 'sustained remission' as no criteria met for 12 or more months. A person in sustained remission does not currently meet the diagnostic threshold for SUD.

The cross-examination question: My client has been housed at Coalinga State Hospital where access to controlled substances is restricted. Is the controlled environment specifier applicable to his SUD diagnosis? If he has not had access to his substance of choice for years, what is the current basis for concluding SUD currently predisposes to sexually violent conduct?

ARGUMENT 4 — THE SPECIFICITY PROBLEM: WHY SEXUAL VIOLENCE RATHER THAN OTHER CONDUCT?

Even if SUD, intoxication, or disinhibition generally increases the risk of misconduct, it does not specifically predispose to sexually violent conduct over all other forms of criminal or problematic behavior. Many individuals with SUD commit property crimes, domestic violence, DUI, or other conduct when intoxicated — but do not commit sexually violent predatory acts.

The evaluator must explain why this individual's substance use specifically produces sexually violent predatory conduct rather than other substance-facilitated antisocial behavior. Without this explanation, the SUD diagnosis establishes only that intoxication impairs judgment generally — not that it specifically predisposes to the commission of criminal sexual acts.

This is the specific failing described in Rogers & Shuman (2005): the clinical condition must cause the specific lack of control over the specific conduct. Co-occurrence of SUD and sexual offending history is not the same as SUD

predisposing to sexually violent conduct.

CROSS-EXAMINATION PATH FOR SUBSTANCE USE DISORDER

- Q: The compulsion in Substance Use Disorder is the compulsion to use substances — not the compulsion to engage in sexually violent acts. How does a compulsion to use drugs or alcohol specifically predispose a person to commit sexually violent predatory acts as required by WIC § 6600(c)?
- Q: If my client simply refrains from using drugs or alcohol, does he have a predisposition to commit sexually violent predatory acts? If the predisposition to sexual violence is contingent on substance use, isn't the predisposition dependent on a voluntary behavior rather than an uncontrollable mental disorder?
- Q: Is voluntary intoxication the kind of volitional impairment required by *Kansas v. Hendricks* and *Kansas v. Crane*? The decision to use substances is — at least initially — a voluntary choice. How does that constitute the disorder-driven inability to control behavior that SVP commitment requires?
- Q: Many individuals with Substance Use Disorder commit crimes when intoxicated — DUI, property crimes, domestic violence — without committing sexually violent predatory acts. What specifically about my client's SUD predisposes him to sexual violence as opposed to other substance-facilitated misconduct?
- Q: My client has been housed at Coalinga State Hospital, a controlled environment where substances are not freely available. Is his SUD currently in remission? Is a person in sustained remission who has no access to substances currently 'predisposed to commission of criminal sexual acts' as required by WIC § 6600(c)?
- Q: SUD is a well-established treatable condition. If the specific mechanism linking SUD to sexual violence is intoxication-based disinhibition, would successful substance abuse treatment — resulting in sobriety — eliminate the predisposition? If yes, how can he currently be an SVP if he is treated and sober?

V. Other Non-Paraphilic Diagnoses: General Framework and Common Examples

a. Narcissistic Personality Disorder, Borderline Personality Disorder, and Other Cluster B Conditions

Beyond ASPD, evaluators sometimes assign other personality disorder diagnoses — Narcissistic Personality Disorder (NPD), Borderline Personality Disorder (BPD), or Personality Disorder, Other Specified — as qualifying or supporting diagnoses. The same fundamental analysis applies. Each personality disorder must be evaluated for

whether it specifically impairs the emotional or volitional capacity relevant to sexually violent predatory conduct, as opposed to general interpersonal dysfunction, emotional dysregulation, or other non-sexually-violent manifestations.

Narcissistic Personality Disorder is characterized by grandiosity, a need for admiration, and lack of empathy — traits that could theoretically relate to nonconsensual sexual conduct as an extension of general disregard for others' rights. However, NPD is primarily a disorder of self-aggrandizement and interpersonal exploitation, not a specific predisposition to sexual violence. Like ASPD, NPD is present in significant portions of the general and incarcerated populations and overlaps extensively with general criminality. The evaluator must explain the specific causal mechanism linking NPD features to sexually violent predatory conduct.

Borderline Personality Disorder is characterized by emotional dysregulation, impulsive behavior, unstable relationships, and fear of abandonment. BPD may produce impulsive sexual behavior but does not specifically predispose to sexually violent predatory conduct. BPD is also notably more frequently diagnosed in women; its use as an SVP qualifying diagnosis for male respondents should be subject to additional scrutiny regarding diagnostic validity and clinical applicability.

> *Sreenivasan et al. (2020), Journal of AAPL: Forensic evaluators using personality disorders in SVP cases 'will have to move beyond a mere recitation of ASPD [or other PD] criteria and support their arguments linking [the diagnosis] to criminal sexual behavior via specific clinical considerations that may include examination of offending patterns, trajectories, risk, and paraphilia-like behavior.'*
> *Norton & Ogloff (2009), JAAPL 37(2):168-181: 'Personality disorders are not generally accepted as significant mental illness within the legal system' due to 'high incidence of personality dysfunction in criminal populations, frequent comorbidity of personality disorders making it difficult to determine direct causation, and difficulty determining where on a continuum personality traits should be defined as illness (or not).'*
> *Norton & Ogloff (2009): 'The legal system, to a significant degree, mirrors the clinical conception of personality disorders as not severe mental diseases or defects, not likely to change, and most often, under volitional control.' A disorder understood to be under volitional control does not produce the constitutionally required serious difficulty in controlling behavior.*

CROSS-EXAMINATION PATH FOR OTHER PERSONALITY DISORDERS

- Q: [For NPD] Narcissistic Personality Disorder is characterized by grandiosity, need for admiration, and lack of empathy. How does a need for admiration or grandiosity specifically predispose a person to commit sexually violent predatory acts rather than other self-serving or exploitative conduct?
- Q: [For BPD] Borderline Personality Disorder is characterized by emotional dysregulation and impulsive behavior. What specific evidence links my client's

emotional dysregulation to sexually violent conduct specifically, as opposed to impulsive conduct generally?

- Q: Research in Norton & Ogloff (2009) describes personality disorders as 'most often under volitional control' from the legal system's perspective. If the disorder is typically under volitional control, how does it produce the 'serious difficulty in controlling behavior' required by *Kansas v. Crane*?
- Q: Personality disorders are 'not generally accepted as significant mental illness within the legal system' due in part to their high prevalence in criminal populations. How does this diagnosis distinguish my client from the typical criminal recidivist?

b. Schizophrenia, Delusional Disorder, and Other Psychotic Spectrum Conditions

Psychotic disorders — Schizophrenia, Schizoaffective Disorder, Delusional Disorder, and related conditions — may in rare circumstances produce sexually violent conduct through specific mechanisms such as command hallucinations directing sexual violence, erotomanic delusions, or disorganized behavior. When an evaluator uses a psychotic disorder as an SVP qualifying diagnosis, the nexus analysis remains fully applicable: the evaluator must identify the specific symptom or symptom cluster that produced volitional impairment over sexually violent conduct in this individual.

The critical additional challenge for psychotic diagnoses is the current symptom status and treatment response question. Schizophrenia and related disorders are generally well-managed with antipsychotic medications. If the psychotic symptoms that allegedly drove the sexual offending are now controlled with medication, the evaluator must explain why the controlled psychotic disorder currently predisposes to future sexually violent conduct. An evaluator who relies on the historical offense and the historical psychotic state without assessing current symptom control has failed to establish a current predisposing condition.

> *Psychiatric Times (2025): 'In a person with mental illness, deviant sexual interest may be related to... a response to command hallucinations in schizophrenia.' This acknowledges the theoretical pathway — but also underscores that the pathway requires specific symptoms (command hallucinations directing sexual violence) that must be currently present.*
> *Scurich et al. (2025): 'The simple co-occurrence of a clinical condition and lack of volitional control is insufficient. The crucial question is whether the clinical condition causes the lack of control.' For psychotic disorders, the evaluator must identify the specific psychotic symptom that causes the specific volitional impairment over sexually violent conduct.*

CROSS-EXAMINATION PATH FOR PSYCHOTIC SPECTRUM CONDITIONS

- Q: You have diagnosed my client with [schizophrenia/schizoaffective disorder]. What specific symptom or symptom cluster — delusions, hallucinations, disorganized thinking — do you believe caused or contributed to the sexually violent conduct?
- Q: My client is currently on antipsychotic medication. Are those specific symptoms currently present and active, or are they controlled by medication? If they are controlled, how does the diagnosis currently predispose him to future sexually violent conduct?
- Q: Is it possible for a person with schizophrenia to have symptoms so well controlled that he no longer has serious difficulty controlling his behavior with respect to sexually violent acts? If yes, is that assessment made in your evaluation?

VI. The Universal Nexus Challenge: A Cross-Examination Template for Any Non-Paraphilic Diagnosis

Regardless of which non-paraphilic diagnosis the evaluator has assigned, the following sequence of cross-examination questions applies universally. These questions target the structural failures common to all non-paraphilic SVP qualifying diagnoses: the missing nexus, the co-occurrence fallacy, the failure to distinguish from ordinary recidivism, and the DSM disclaimer.

STEP 1 — ESTABLISH THE LEGAL STANDARD FOR QUALIFYING MENTAL DISORDERS

Q: Under WIC § 6600(c), a qualifying diagnosed mental disorder is defined as a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts. That is the legal definition you were applying. Is that correct?

Q: Under *Kansas v. Crane* (2002) 534 U.S. 407, for civil commitment the mental disorder must cause the individual to have serious difficulty controlling his sexual behavior. Is that the constitutional standard you were applying?

Q: Under *Kansas v. Crane*, the mental disorder must distinguish the dangerous sexual offender from the 'dangerous but typical recidivist.' Is that distinction part of your analysis?

STEP 2 — ESTABLISH THE DSM DISCLAIMER

Q: Are you familiar with the statement in the DSM-5-TR on page xxiii that states: 'A clinical diagnosis is not sufficient to establish the existence for legal purposes of a mental disorder'?

Q: That same section states that 'having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.' Were you aware of that statement when preparing your evaluation?

Q: What does that mean for SVP evaluations — that having a diagnosis is not sufficient? What additional showing is required to go from diagnosis to qualifying mental disorder?

STEP 3 — EXPOSE THE CO-OCCURRENCE FALLACY

Q: My client has [ASPD/Bipolar Disorder/SUD]. My client has committed sexually violent offenses in the past. Is that all you need to conclude that the mental disorder qualifies him for SVP commitment?

Q: Research by Rogers and Shuman (2005) states: 'The simple co-occurrence of a clinical condition and lack of volitional control is insufficient. The crucial question is whether the clinical condition causes the lack of control. This nexus cannot be inferred from diagnoses.' Would you agree with that statement?

Q: The fact that my client has [diagnosis] and has committed sexually violent offenses establishes co-occurrence — both exist in the same person. How did your evaluation move beyond co-occurrence to establish causation — that the diagnosis causes the predisposition to sexually violent conduct?

STEP 4 — DEMAND THE SPECIFIC CAUSAL MECHANISM

Q: Walk me through the specific clinical mechanism by which my client's [diagnosis] impairs his volitional or emotional capacity with respect to sexually violent predatory acts. Not in general — in this specific individual.

Q: What symptom, feature, or criterion of [diagnosis] specifically produces the predisposition to sexually violent conduct? Is that feature necessarily present in every person diagnosed with [diagnosis]? If not, what evidence establishes it is present in my client?

Q: What distinguishes my client's [diagnosis] from the same diagnosis in the majority of people who have it but never commit sexually violent predatory acts?

STEP 5 — ESTABLISH THE ORDINARY RECIDIVIST DISTINCTION

Q: Kansas v. Crane requires that the qualifying mental disorder distinguish the dangerous sexual offender from the dangerous but typical recidivist. A person who has ASPD [or bipolar disorder, or SUD] and has committed crimes, including sex crimes, is a criminal recidivist. What specifically distinguishes my client — with his [diagnosis] — from that typical criminal recidivist?

Q: What percentage of people with [diagnosis] commit sexually violent predatory acts? What is the base rate? Does having [diagnosis] meaningfully distinguish a sex offender from the typical recidivist?

Q: If the only basis for saying this person has a qualifying mental disorder is that he has [diagnosis] and has committed sexual offenses, isn't that simply defining criminality as mental disorder — exactly what *Kansas v. Hendricks* said SVP commitment cannot be based on?

VII. Case Law and Authority Reference Summary

FEDERAL / SUPREME COURT AUTHORITY

Kansas v. Hendricks (1997) 521 U.S. 346: SVP commitment requires a mental disorder that produces 'volitional impairment rendering [the person] dangerous beyond their control.' The disorder must distinguish the SVP from 'dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'

Kansas v. Crane (2002) 534 U.S. 407: 'There must be proof of serious difficulty in controlling behavior.' The disorder must 'distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist.'

Foucha v. Louisiana (1992) 504 U.S. 71: Cannot civilly confine merely based on dangerousness; there must be a qualifying mental disorder meeting constitutional standards.

Crane at 413 (Scalia/Thomas dissent, quoting majority in *Hendricks*): The existence of a mental abnormality or personality disorder alone cannot automatically establish volitional impairment — these are distinct findings.

CALIFORNIA AUTHORITY

WIC § 6600(c): Qualifying diagnosed mental disorder = 'a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.'

People v. Gudino (unpublished California SVP): ASPD not qualifying because state failed to prove a lack of impulse control (the volitional prong) predisposing specifically to sexual criminal acts. Court did not reject ASPD per se — it rejected the failure to establish the specific nexus.

People v. Wollschlager (2002) 99 Cal.App.4th 1303: Qualifying disorder requires serious difficulty controlling dangerous behavior — this is a specific, individualized finding, not a general conclusion from a diagnosis.

People v. Williams (2003) 31 Cal.4th 757: The mental disorder must actually predispose the person to criminal sexual acts — the predisposition is the key statutory element that must be established through specific clinical evidence.

SCHOLARLY AND CLINICAL AUTHORITY

Rogers & Shuman (2005), cited in JAAPL 33(4):523: 'The simple co-occurrence of a clinical condition and lack of volitional control is insufficient. The crucial question is whether the clinical condition causes the lack of control. This nexus cannot be inferred from diagnoses.'

DSM-5-TR, p. xxiii: 'A clinical diagnosis is not sufficient to establish the existence for legal purposes of a mental disorder' and 'having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.'

Sreenivasan et al. (2020), Journal of AAPL: ASPD criteria 'do not include terms such as predisposition to deviant sexual behavior or volitional or emotional impairment.' Evaluators 'will have to move beyond a mere recitation of ASPD criteria.'

Vognsen & Phenix (2004), Journal of AAPL 32(4):440: 'A clear sexual disorder must be present before a person can be found to be an SVP/SDP, and a diagnosis of antisocial personality disorder is not enough.'

Model Penal Code § 4.01: 'The terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.'

Norton & Ogloff (2009), JAAPL 37(2):168: 'The legal system, to a significant degree, mirrors the clinical conception of personality disorders as not severe mental diseases or defects, not likely to change, and most often, under volitional control.'

Kopeykina et al. (2016) review: Bipolar-related hypersexuality literature is 'mostly

outdated and lacks a consistent definition of hypersexuality.' Research gap between mania-induced hypersexuality and sexually violent predatory conduct.

Scurich, Martinez & Krauss (2025): Volitional impairment is 'central to SVP commitment' but forensic professionals demonstrate 'substantial, often contradictory, variability' in assessment — agreement on hypothetical cases only 72–79%, with critical discrepancies even within the same jurisdictions.

Garrick, Frayne & Hulse (2008), JAAPL 36(3):375: Bipolar disorder and SUD 'could be argued' as qualifying disorders 'in such instances' where specific mechanisms are demonstrated — but this is framed as theoretical, not automatic.

NIDA: 'The initial decision to take drugs is generally voluntary.' Voluntary substance use as the mechanism linking SUD to offense conduct undermines the volitional impairment requirement for SVP commitment.

N. Cross-Examination Strategy — Volitional Control / Impairment

The Sexually Violent Predator Act requires more than a diagnosis and a criminal record. Under Kansas v. Crane (2002) 534 U.S. 407, the Constitution requires that SVP commitment be limited to those who have serious difficulty controlling their behavior — not merely those who are dangerous recidivists. The evaluator's opinion on volitional impairment is therefore one of the most legally consequential and scientifically contested components of an SVP evaluation. This subsection provides defense counsel with the legal framework, the published scientific research, and a complete cross-examination strategy for challenging volitional impairment testimony at the probable cause hearing and at trial.

a. The Constitutional and Regulatory Framework: What Volitional Impairment Actually Requires

The United States Supreme Court held in *Kansas v. Hendricks* (1997) 521 U.S. 346 that SVP commitment is constitutionally permissible only for individuals who cannot control dangerous behavior due to a mental abnormality. Two aspects of that holding are critical: first, *Hendricks* himself had testified that when he became 'stressed out' he could not control the urge to offend against children — his loss of control was admitted, personal, and directly tied to a specific psychological state. Second, the Court grounded

its holding in that individualized, subjective testimony. It did not hold that recidivism itself is evidence of volitional impairment.

Five years later, in *Kansas v. Crane* (2002) 534 U.S. 407, the Supreme Court clarified: civil commitment of a sex offender requires proof that the person has 'serious difficulty in controlling behavior.' The Court did not require proof of total inability to control, but it required something more than a diagnosis and a history of offenses. It required that courts distinguish SVPs from 'dangerous but typical recidivists.'

California's SVP Act and the Department of State Hospitals Clinical Evaluator Handbook address volitional impairment through California Code of Regulations Title 9, Section 4014, which defines 'impaired volitional capacity' to include 'failure to conform his or her behavior to the law despite the risk of criminal punishment.' This regulatory definition is the source of the constitutional problem defense counsel must confront: the Section 4014 definition of volitional impairment is indistinguishable from the definition of a recidivist. Anyone who commits a second offense despite knowing it is illegal satisfies Section 4014's standard. But the Supreme Court in *Crane* expressly required a distinction between SVPs and such persons.

⚠ **The Core Constitutional Problem:** California Code of Regulations Title 9, Section 4014 defines volitional impairment as 'failure to conform behavior to law despite risk of criminal punishment.' That is the definition of recidivism. Under *Kansas v. Crane*, the Constitution requires more — proof of serious difficulty controlling behavior that distinguishes SVPs from ordinary repeat offenders. An evaluator who meets the Section 4014 standard has not necessarily met the constitutional standard.

b. The Published Scientific Research on Volitional Impairment — What the Literature Shows

The scientific literature on volitional impairment in sex offenders is extensive, and its conclusions are overwhelmingly critical of the methodology SVP evaluators use. The following is a survey of the key published research defense counsel should deploy in cross-examination.

1. The APA's Own Position: Paraphilia Diagnoses Do Not Establish Volitional Impairment

The American Psychiatric Association's Task Force on Dangerous Sex Offenders (1999) concluded that paraphilias 'do not involve volitional impairment.' The Task Force specifically noted that the DSM criteria for paraphilias do not include any requirement of

a predisposition to act on urges, and that the presence of a paraphilic disorder does not, by itself, establish that an individual cannot control the associated behavior. This is the official position of the organization that publishes the DSM — the very diagnostic manual evaluators use.

2. Frances & First (2008) — The Leading Forensic Psychiatry Warning

Allen Frances and Michael B. First, writing in the Journal of the American Academy of Psychiatry and the Law (2008), titled their article explicitly: 'Hebephilia Is Not a Mental Disorder in DSM-IV-TR and Should Not Become One in DSM-5.' Their broader warning for SVP proceedings was that evaluators should not 'assume volitional impairment from the mere fact of a paraphilia diagnosis.' They argued that doing so produces 'profound and avoidable errors' in SVP commitments. This is the gold standard citation for the proposition that diagnosis does not equal volitional impairment.

3. Rogers & Jackson (2005) — Volitional Impairment Is Systematically Ignored by Risk Assessments

Richard Rogers and James Jackson, writing in the Journal of the American Academy of Psychiatry and the Law (2005), found that 'volitional impairment is systematically ignored by all risk assessment measures.' This is a direct refutation of the common evaluator practice of pointing to a Static-99R score as support for the volitional impairment conclusion. The Static-99R, as Rogers and Jackson documented, measures risk of reoffending — it does not measure behavioral control capacity. An evaluator who conflates risk with impairment has committed the methodological error these researchers identified.

4. Winsmann (2012) — Testing Is Required; Historical Behavior Alone Is Insufficient

Winsmann, in research cited in Scurich et al. (2025), recommended the use of specific neurocognitive assessment tools to evaluate volitional capacity, including: the Wisconsin Card Sorting Test (WCST), which measures cognitive flexibility and executive function; the Iowa Gambling Task (IGT), which assesses decision-making under conditions where impulse control is required; and the Barratt Impulsiveness Scale (BIS-11), a validated psychometric instrument for measuring impulsivity. Winsmann specifically cautioned 'against relying solely on past actions to determine impairment' — precisely the approach that California evaluators routinely employ.

5. Scurich et al. (2025) — Forensic Professionals Lack Empirical Knowledge of Volitional Impairment

A 2025 study by Nicholas Scurich and colleagues in the journal Law and Human Behavior examined how practicing forensic professionals conceptualize and apply the construct of volitional impairment in SVP evaluations. The researchers documented 'a striking lack of empirical knowledge about how practicing forensic professionals conceptualize and apply the construct.' The study emphasized that volitional impairment determinations 'require both historical and current behavior in addition to testing to obtain a thorough understanding' of behavioral control capacity. Without current behavioral evidence and validated testing, the determination is not a clinical finding — it is an assumption.

6. Levenson (2004) — Poor Inter-Rater Reliability on Volitional Impairment Findings

Jill Levenson's 2004 study of SVP evaluators in Florida found poor inter-rater reliability when evaluators assessed volitional impairment. Different evaluators examining the same individuals reached different conclusions about the presence of volitional impairment with statistically meaningful frequency. This finding directly undermines the claim that volitional impairment determinations are the product of sound clinical science rather than subjective professional judgment.

7. Mercado, Pearce & Schopp (2006) — No Professional Consensus on What Constitutes Volitional Impairment

A 2006 vignette study by Mercado, Pearce, and Schopp presented a clinical vignette of a pedophilic offender to professional raters and asked them to assess whether the subject could control his behavior. The results showed no professional consensus: 66% of raters concluded the subject was able to control his conduct. This study demonstrates that even when professionals are given identical factual information, they reach divergent conclusions about volitional impairment — a finding inconsistent with the degree of certainty that SVP evaluators routinely express in their reports and testimony.

8. Briken & Muller (2014) — Indicators Against Volitional Impairment That Evaluators Must Consider

German researchers Briken and Muller published a framework of specific indicators that point away from volitional impairment — factors that, if present, suggest the respondent

chose to offend rather than being compelled by an inability to control behavior. These indicators include: advance planning of offenses; multi-step offense sequences requiring sustained purposive action; precautions taken to avoid detection; ability to wait for opportunities; grooming behavior executed over extended periods; and maintaining offense-free periods when under supervision or surveillance. When evaluators fail to consider these factors — and California evaluators routinely do not address them — their volitional impairment conclusions rest on an incomplete and methodologically unsound analysis.

9. Doren & Thornton (2012) — Volitional Impairment Has Never Been Validated as a Clinical Construct in SVP Evaluations

Dennis Doren and David Thornton, two of the most widely cited researchers in the SVP evaluation field, noted in 2012 that volitional impairment as applied in SVP proceedings 'has never been validated.' There is no actuarial instrument, no psychometric test, no validated protocol that evaluators use to measure volitional impairment. What evaluators call a 'clinical determination' of volitional impairment is, by the admission of the field's leading researchers, an unvalidated construct applied without empirical support.

● **KEY POINT:** The weight of peer-reviewed literature in forensic psychology and forensic psychiatry establishes that: (1) paraphilia diagnosis does not establish volitional impairment; (2) risk assessment scores do not measure behavioral control capacity; (3) evaluators routinely fail to use available neurocognitive testing tools that could actually assess volitional capacity; (4) evaluators routinely fail to consider evidence pointing away from volitional impairment; and (5) the field has no validated method for making this determination. This body of literature gives defense counsel powerful tools for cross-examination.

c. Identifying the Circular Reasoning Pattern — Defense Counsel's Primary Target

The most pervasive and legally significant problem with SVP evaluator volitional impairment testimony is circular reasoning. The pattern is as follows:

> Step 1: The evaluator diagnoses the respondent with pedophilic disorder or another paraphilic disorder.

> Step 2: The evaluator's basis for the diagnosis is the respondent's criminal offenses — the evaluator infers the paraphilia from the pattern of offending.
>
> Step 3: The evaluator then concludes that the respondent has volitional impairment.
>
> Step 4: The evaluator's basis for the volitional impairment conclusion is the same criminal offenses — the evaluator cites the respondent's 'failure to refrain from offending' as evidence of impaired control.
>
> Result: The offenses are used to prove the diagnosis, and the diagnosis — embodied in the same offenses — is then used to prove the impairment. The offenses are doing double duty as both the basis for the diagnosis and the evidence of volitional impairment. This is a logical circle, not a clinical finding.

Defense counsel should expose this circular reasoning explicitly during cross-examination. The technique is to require the evaluator to identify any evidence of volitional impairment that does not consist of the offenses themselves. If the evaluator cannot do so — and in most cases cannot — the logical circle becomes clear to the trier of fact.

d. Cross-Examination: Questions for the Evaluator on Volitional Impairment

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The following questions are organized by topic area. Counsel should select and adapt questions based on the specific content of the evaluator's report and testimony. Questions are numbered for reference; they are not intended to be used in this precise sequence.

Topic 1: Credentials and Methodology Foundation

Q1. You have diagnosed [Respondent] with [disorder] and concluded that he has impaired volitional capacity to control his sexually violent behavior. Correct?

Q2. That conclusion — the volitional impairment finding — is a separate determination from the diagnosis, correct? Those are two distinct elements of your evaluation?

Q3. So I should be able to ask you: separate from the criminal offenses and the diagnosis, what is your evidence of volitional impairment?

Q4. Are you familiar with *Kansas v. Crane* (2002), in which the Supreme Court held that SVP commitment requires proof that the person has 'serious difficulty in controlling behavior'?

Q5. That case also required that courts distinguish sexually violent predators from 'dangerous but typical recidivists,' correct?

Q6. That distinction — between SVPs and typical recidivists — is one you are required to make in your evaluation?

Q7. What is your methodology for making that distinction in this case?

Topic 2: The Paraphilia Diagnosis Does Not Establish Volitional Impairment

Q8. Are you aware that the American Psychiatric Association's Task Force on Dangerous Sex Offenders concluded in 1999 that paraphilias 'do not involve volitional impairment'?

Q9. That is the official position of the organization that publishes the DSM — the diagnostic manual you used to diagnose [Respondent], correct?

Q10. The DSM-5-TR criteria for [disorder] do not include any requirement that the individual be unable to control behavior consistent with the disorder, do they?

Q11. So the diagnosis of [disorder] tells you that [Respondent] has the disorder — but it does not, by itself, tell you whether he can or cannot control the behavior, correct?

Q12. Are you aware of the Frances and First (2008) article in the Journal of the American Academy of Psychiatry and the Law that warned against assuming volitional impairment from a paraphilia diagnosis, calling such an assumption a 'profound and avoidable error'?

Q13. You are familiar with the Journal of the American Academy of Psychiatry and the Law — that is the leading peer-reviewed journal in forensic psychiatry?

Q14. And the authors' warning was specifically directed at evaluators conducting SVP evaluations, correct?

Topic 3: Risk Assessment Scores Do Not Measure Volitional Impairment

Q15. You administered the Static-99R in this evaluation, correct?

Q16. The Static-99R is an actuarial risk assessment instrument designed to predict the probability of sexual recidivism, correct?

Q17. It measures the statistical likelihood that someone with a given score will reoffend — it does not measure whether the person can control himself, correct?

Q18. Are you familiar with Rogers and Jackson's 2005 article in the Journal of the American Academy of Psychiatry and the Law, finding that 'volitional impairment is systematically ignored by all risk assessment measures'?

Q19. So the Static-99R score you cited does not, in fact, tell you anything about [Respondent]'s capacity to control his behavior?

Q20. Your volitional impairment finding, then, cannot rest on the Static-99R score, because that instrument does not measure what you are claiming to determine?

Topic 4: The Absence of Neurocognitive Testing

Q21. There are validated neurocognitive instruments available that can assess behavioral control capacity, correct?

Q22. The Wisconsin Card Sorting Test — are you familiar with it?

Q23. The Iowa Gambling Task — are you familiar with that instrument?

Q24. The Barratt Impulsiveness Scale — are you familiar with that?

Q25. These tools have been specifically proposed in the published literature as instruments that can actually measure aspects of volitional control capacity, correct?

Q26. Did you administer any of these instruments to [Respondent]?

Q27. So you concluded that [Respondent] has impaired volitional capacity without using any instrument validated to measure volitional capacity?

Q28. Winsmann, in research reviewed in Scurich et al. (2025) in Law and Human Behavior, specifically cautioned 'against relying solely on past actions to determine impairment.' You relied solely on past actions, correct?

Topic 5: Indicators Against Volitional Impairment — The Evidence You Did Not Consider

Q29. In [Respondent]'s offense history, did he engage in grooming behavior over a period of time before the offense?

Q30. Grooming requires sustained, purposive action over time — planning, building trust, creating opportunities, correct?

Q31. Did he take precautions to avoid detection — for example, choosing times or locations where he was unlikely to be observed?

Q32. Did he stop offending during periods when he was under supervision, incarcerated, or otherwise at elevated risk of detection?

Q33. Did he commit the offense through a multi-step sequence of actions — not a single impulsive act, but a series of deliberate steps?

Q34. Are you familiar with the framework published by Briken and Muller (2014) identifying behaviors that indicate the offender could control himself — including advance planning, precautions, selective timing, and offense-free periods?

Q35. Under that framework, the behaviors I just described — planning, precautions, selective timing, offense-free periods under supervision — would all be indicators against volitional impairment, correct?

Q36. Did you address any of these indicators in your report?

Q37. Did you give any weight to the evidence suggesting [Respondent] was choosing to offend rather than being compelled to do so?

Topic 6: The Circular Reasoning Problem

Q38. Let me ask you directly: your diagnosis of [disorder] is based primarily on [Respondent]'s history of sexual offenses against [victims], correct?

Q39. And your conclusion that [Respondent] has volitional impairment is based in part on his pattern of reoffending — his 'failure to refrain' despite the risk of punishment?

Q40. So the offenses are the basis for the diagnosis AND the basis for the volitional impairment conclusion?

Q41. If I removed the offenses from your analysis, what would remain as your evidence of volitional impairment?

Q42. So the offenses are doing double work in your analysis — they prove the diagnosis and they prove the impairment?

Q43. What evidence of volitional impairment do you have that does not consist of the offenses themselves?

Q44. Isn't it true that under your methodology, virtually any person with a paraphilia diagnosis and more than one offense would satisfy your volitional impairment standard?

Q45. Doesn't that fail to distinguish [Respondent] from a 'dangerous but typical recidivist' — as the Supreme Court required in *Crane*?

Topic 7: Reliability and Professional Consensus

Q46. Levenson's 2004 field study of SVP evaluators found poor inter-rater reliability on volitional impairment determinations, correct?

Q47. That means that if a different evaluator examined the same file, they might reach a different conclusion on volitional impairment?

Q48. Mercado, Pearce, and Schopp's 2006 vignette study found that 66% of professional raters concluded a pedophilic offender was able to control his conduct. Are you aware of that study?

Q49. That study showed no professional consensus on what constitutes volitional impairment in a case very similar to this one, correct?

Q50. Doren and Thornton — two of the most cited researchers in SVP risk assessment — wrote in 2012 that volitional impairment as applied in SVP proceedings 'has never been validated.' Are you aware of that?

Q51. And the 2025 Law and Human Behavior study found a 'striking lack of empirical knowledge' about how professionals conceptualize volitional impairment in SVP evaluations. Correct?

Q52. Given all of this — the lack of validated instruments, the poor inter-rater reliability, the absence of professional consensus, the specific warnings against assuming impairment from diagnosis — on what basis do you claim certainty in your volitional impairment finding in this case?

Topic 8: The *Hendricks* Standard — Did Respondent Admit Loss of Control?

Q53. In the *Hendricks* case, the Supreme Court's holding was grounded in *Hendricks*' own testimony that when he became 'stressed out,' he could not control the urge to molest children. Are you aware of that?

Q54. That was a specific, individualized, subjective admission by *Hendricks* of a psychological state that caused loss of control, correct?

Q55. Did [Respondent] make any similar admission that he cannot control himself?

Q56. Did he describe his offenses as something he felt compelled to do rather than something he chose to do?

Q57. Did you conduct a structured clinical interview specifically asking [Respondent] about his subjective experience of control — whether he experiences urges as ego-dystonic or ego-syntonic?

Q58. Did you ask whether there have been times when he had urges but chose not to act on them?

Q59. If there are such instances — times when he had urges and refrained — doesn't that demonstrate that he can control the behavior?

Practice Note: If the evaluator responds that he did ask these questions and the respondent denied having urges at all, or refused to discuss the subject, press on what independent evidence of volitional impairment the evaluator then relied upon. The absence of an admission is not evidence of impairment. The evaluator must have

independent evidence. If the evaluator falls back on the offenses and the diagnosis, return to the circular reasoning questions above.

O. Cross-Examining On The Static-99R Score

The Static-99R is the most widely used actuarial risk assessment instrument in sexually violent predator proceedings nationwide. California SVP evaluators administer it in virtually every case and present its scores to courts as objective evidence of future dangerousness. Defense counsel who understand the instrument's construction, its validation history, and its documented limitations — including the fundamental structural problem that it was not designed to assess SVPs — can mount an effective cross-examination that exposes the gap between what the evaluator claims the instrument shows and what it actually measures.

a. What the Static-99R Is — and What It Is Not

The Static-99R is an actuarial risk assessment tool consisting of ten items drawn from demographic characteristics and criminal history. Each item was selected because it correlated statistically with sexual recidivism in the normative samples used in the instrument's development. The ten items are:

Item	Description	SVP/Non-Sex Offense Issue
Item 1	Age at release from index sex offense (younger = higher risk)	None — demographic factor
Item 2	Ever lived with a lover for ≥ 2 years (no = higher risk)	None — relationship history
Item 3	Index nonsexual violence — any convictions	NON-SEXUALLY-VIOLENT offense adds points to SVP risk score
Item 4	Prior nonsexual violence — any convictions	NON-SEXUALLY-VIOLENT offenses add points to SVP risk score
Item 5	Prior sex offenses (charges and convictions)	Directly relevant — sexual offense history
Item 6	Prior sentencing dates (number of sentencing episodes)	NON-SEXUAL OFFENSES count — general criminality measure

Item	Description	SVP/Non-Sex Offense Issue
Item 7	Any convictions for noncontact sexual offenses	Relevant — sexual offense factor
Item 8	Any unrelated victims	Victim characteristic — somewhat relevant
Item 9	Any stranger victims	Victim characteristic — somewhat relevant
Item 10	Any male victims	Victim characteristic — relevant for pedophilic cases

Source: Phenix, Fernandez, Harris, Helmus, Hanson & Thornton (2016), Static-99R Coding Rules (Revised). See also iResearchNet, Static-99 and Static-99R.

b. The Structural Problem: Non-Sexual Offenses in an SVP-Specific Instrument

Items 3, 4, and 6 of the Static-99R — three of the ten items — include or count non-sexual offenses. Item 3 scores any conviction for a violent, nonsexual crime at the time of the index sex offense. Item 4 scores any prior nonsexual violent convictions. Item 6 counts the total number of sentencing dates for any offense, sexual or not.

The Sexually Violent Predator Act targets a specific, constitutionally defined population: persons who have been convicted of sexually violent offenses and who, due to a diagnosed mental disorder, are likely to commit sexually violent criminal acts. The Act does not target general recidivists or violent non-sexual offenders. Yet an individual's score on the Static-99R — the instrument used to predict whether someone qualifies as a likely sexually violent reoffender — increases based on non-sexual offenses.

This creates a direct structural problem: a person who has committed assault and robbery, with no particular pattern of sexual offending, will score higher on the Static-99R than an individual who has committed multiple sexual offenses but no non-sexual violent crimes. The instrument's prediction of 'sexual recidivism risk' is being inflated by criminal history that has nothing to do with sexual offending. For SVP proceedings — which require a showing of likely sexual reoffending due to a specific mental disorder — the inclusion of non-sexual offense items is a fundamental design problem that undermines the instrument's validity for this specific legal application.

● **KEY POINT:** Three of the ten Static-99R items — 30% of the instrument — score non-sexually-violent offense history. Items 3 (index nonsexual violence), 4 (prior nonsexual violence), and 6 (prior sentencing dates for any offense) increase an

individual's 'sexual recidivism risk' score based on crimes having nothing to do with sexually violent offending. In SVP proceedings, where the question is whether a mental disorder makes the person likely to reoffend sexually, a risk instrument inflated by non-sexual offense history is measuring general criminality, not the specific risk the law requires to be assessed.

c. The Research Evidence on Static-99R Accuracy, Limitations, and SVP-Specific Problems

The peer-reviewed literature on the Static-99R is extensive. Much of it supports the instrument's moderate predictive validity in general sex offender populations. But a substantial body of research has documented specific, serious limitations that are directly relevant to SVP proceedings. Defense counsel should be familiar with the following:

1. Norms Do Not Replicate — Recidivism Rates Vary Widely Across Samples

Wollert and Frenda, writing in the Journal of the American Academy of Psychiatry and the Law under the title 'Alice in Actuarial-Land: Through the Looking Glass of Changing Static-99 Norms' (JAAPL, 2010), documented that replication studies of the Static-99 and Static-99R have produced widely varying recidivism rates for the same score. The article concluded that 'studies conducted since the publication of the Static-99 have not replicated the original norms. Sexual recidivism rates for the same Static-99 score vary widely, from low to high, depending on the sample used.' This variance is so substantial that it is 'essentially impossible to establish a risk estimate with a high level of confidence.' (Donaldson, Abbott & Michie (2012), 'Problems with the Static-99R Prediction Estimates and Confidence Intervals,' Semantic Scholar.)

2. The Instrument Overpredicts Recidivism — Especially for SVPs

A California-specific study (Azizian, Olver, Rokop & D'Orazio, June 2021, 34(1), published in Sexual Abuse, 2021) examined the recidivism rates and predictive validity of the Static-99R in 335 men detained or committed as SVPs under California's SVPA, followed up for approximately 21 years. The results were striking: the Static-99R 'demonstrated small in magnitude discrimination for sexual, violent, and general recidivism (area under the curve [AUC]/C = .56 to .63).' Critically, calibration analyses 'demonstrated that the Static-99R overpredicted sexual recidivism, irrespective of whether the Routine or High Risk/Need norms were used.' The observed recidivism rates were lower than predicted by Static-99R scores.

The Helmus et al. (2022) comprehensive meta-analysis similarly found that Static-99R normative data 'significantly overestimated recidivism,' with the norms estimating '73% more recidivists than there actually were' across validation samples.

3. Adversarial Allegiance Distorts Reporting Practices

Boccaccini and colleagues (2014) surveyed 109 experts who conduct SVP evaluations about their Static-99R score reporting and interpretation practices. The study found evidence of adversarial allegiance: 'Defense evaluators were more likely to endorse reporting practices that convey the lowest possible level of risk... whereas prosecution evaluators were more likely to endorse practices suggesting the highest possible level of risk.' State-agency evaluators — such as California's Department of State Hospitals evaluators — 'tended to be more consistent with those of prosecution evaluators than defense evaluators.' (Boccaccini et al., 'Static-99R Reporting Practices in Sexually Violent Predator Cases: Does Norm Selection Reflect Adversarial Allegiance?' PubMed, 25495715.) This finding establishes that the 'objective' risk estimate the evaluator presents to the court is, in practice, influenced by which side the evaluator works for.

4. AUC Values Reveal Only Moderate Predictive Accuracy

The Static-99R's predictive accuracy is typically expressed as an area-under-the-curve (AUC) statistic. An AUC of .50 represents chance prediction; an AUC of 1.0 represents perfect prediction. Meta-analyses have consistently found AUC values for the Static-99R in the range of .65 to .72 for sexual recidivism in general sex offender samples. In the California SVP population studied by Azizian et al. (2021), the AUC ranged from .56 to .63 — barely above chance. These values mean that a randomly selected recidivist has only a 56–72% probability of scoring higher than a randomly selected non-recidivist. This is moderate predictive accuracy at best, marginal accuracy at worst for a population as highly selected as California's SVP evaluation subjects.

5. The Normative Sample Problem: Who Was in the Reference Group?

The Static-99R's recidivism estimates are based on a comparison group — the normative sample. Evaluators must choose between the 'Routine' sample and the 'High Risk/Need' sample. These groups produce dramatically different recidivism estimates: for the same score, the difference between Routine and High Risk/Need norms can amount to a factor of two or more in the predicted probability of reoffense. The 'Alice in Actuarial-Land' article noted the practical consequence: 'by the Static-99R estimates, [an individual] falls somewhere between low and high risk' — a spread so large as to render the estimate clinically meaningless for the individual respondent.

California's SVP population is itself a highly selected group — screened through multiple layers of criminal justice intervention before reaching an SVP evaluation. The original Static-99R normative samples were drawn from general released sex offender populations, not from individuals already filtered through the SVP referral process. The normative sample representativeness problem directly affects the validity of applying the instrument's recidivism estimates to California SVP respondents.

6. The Instrument Was Not Designed for SVP Determinations

The most fundamental limitation for SVP proceedings is one the instrument's own developers acknowledge. The Static-99R coding rules state explicitly: 'Most risk assessment scales are developed to broadly rank individuals according to their risk to reoffend, not to inform particular legal decisions. Consequently, there is almost always a gap between what the scale measures and the referral question.' (Helmus et al. (2022), 'Static-99R: Strengths, Limitations, Predictive Accuracy Meta-Analysis, and Applied and Legal Admissibility Information.') The 'referral question' in SVP proceedings is not merely who is at highest risk of reoffending among a general population of sex offenders — it is whether a specific individual's mental disorder makes him likely to commit sexually violent crimes. The Static-99R does not answer that question. It ranks relative risk. It does not diagnose mental disorders or prove that any risk above the baseline threshold results from a specific mental abnormality.

d. Cross-Examination Questions on the Static-99R

Topic 1: The Instrument's Purpose and Design

Q1. You administered the Static-99R in this case, correct?

Q2. The Static-99R is an actuarial risk assessment instrument — it uses statistical correlations to predict the probability of future sexual reoffense, correct?

Q3. It was not designed to diagnose a mental disorder, correct?

Q4. It was not designed to assess whether someone has impaired volitional capacity, correct?

Q5. In fact, the instrument's own developers have written that 'most risk assessment scales are developed to broadly rank individuals according to their risk to reoffend, not to inform particular legal decisions,' and that there is 'almost always a gap between what the scale measures and the referral question.' You are aware of that?

Q6. The referral question in an SVP proceeding is whether this individual's mental disorder makes him likely to commit sexually violent criminal acts — and you're telling the court that the Static-99R answers that question?

Topic 2: The Non-Sexual Offense Problem

Q7. Let's go through the Static-99R's ten items. I want to focus on Items 3, 4, and 6. You're familiar with all ten items?

Q8. Item 3 — 'index nonsexual violence, any convictions' — scores a person one point for any conviction for a violent, nonsexual crime at the time of the sex offense, correct?

Q9. That would include assault, robbery, kidnapping — crimes that have nothing to do with sexual offending?

Q10. Item 4 — 'prior nonsexual violence, any convictions' — scores prior convictions for violent, nonsexual crimes, correct?

Q11. Again — assault, battery, robbery, those kinds of offenses?

Q12. Item 6 — 'prior sentencing dates' — counts the total number of sentencing episodes for any offense, sexual or not?

Q13. So three of the ten items — thirty percent of the instrument — add points to someone's 'sexual recidivism risk' score based on non-sexual offense history?

Q14. These non-sexual offense items inflate the risk score for someone who is a general criminal — not necessarily someone with a specific propensity for sexual reoffending?

Q15. In an SVP proceeding — where the law requires the evaluator to assess whether a mental disorder makes someone likely to commit sexually violent acts — why are non-sexual violent offenses adding points to the risk score?

Q16. A person with two robbery convictions and one sexual conviction will score higher on the Static-99R than a person with one robbery conviction and one sexual conviction, even if their sexual offense history is identical, correct?

Q17. So the instrument is measuring general criminality as well as sexual offense risk — and you are using it in a proceeding that is only about sexual offense risk?

Topic 3: The Overprediction Problem in California's SVP Population

Q18. Are you familiar with the California-specific study by Azizian and colleagues published in Sexual Abuse (2021)?

Q19. That study specifically examined the Static-99R's performance in 335 men released from California state hospitals under the SVPA — the exact population you are evaluating?

Q20. The study found that the Static-99R had only small predictive accuracy for sexual recidivism in this California SVP population, with an area under the curve ranging from .56 to .63?

Q21. An AUC of .56 means that a randomly selected recidivist has only a 56% chance of scoring higher than a randomly selected non-recidivist — barely above the 50% that represents random chance?

Q22. The same study found that the Static-99R overpredicted sexual recidivism in the California SVP population — the actual recidivism rates were lower than the instrument predicted?

Q23. The Helmus (2022) meta-analysis found that the Static-99R norms estimated 73% more recidivists than actually occurred across validation samples?

Q24. So when you tell this court that [Respondent]'s score places him in a certain risk category with a certain predicted probability of reoffense, you are using an instrument that has been shown to overpredict recidivism by as much as 73% in the type of population you are evaluating?

Topic 4: The Norm Selection Problem

Q25. Which normative sample did you use to interpret [Respondent]'s score — the Routine sample or the High Risk/Need sample?

Q26. The Routine and High Risk/Need samples produce different recidivism estimates for the same score, correct?

Q27. For a score of [X], the Routine sample would estimate a recidivism probability of approximately [X%], while the High Risk/Need sample would estimate approximately [Y%]?

Q28. You chose the [sample name] — but state agency evaluators have been found in research to select norms that produce higher risk estimates more often than defense evaluators. Were you aware of that finding?

Q29. The criterion for selecting which normative sample to use is whether the respondent is 'more similar' to one group or the other — correct?

Q30. And the determination of which group the respondent is 'more similar to' is a subjective clinical judgment on your part?

Q31. So the specific recidivism percentage you are presenting to this court depends on a subjective judgment call about normative sample selection — not a purely objective calculation?

Topic 5: The AUC and Confidence Interval Problems

Q32. The instrument's developers and researchers have cautioned that it is 'essentially impossible' to establish a risk estimate with a high level of confidence from the Static-99R. You are aware of that research?

Q33. The area-under-the-curve value for the Static-99R in sexual recidivism prediction typically falls between .65 and .72 in general sex offender samples, correct?

Q34. In the California SVP population, it was as low as .56 to .63. Correct?

Q35. An AUC in that range means there is a 27 to 44 percent chance that a randomly selected non-recidivist scores higher than a randomly selected recidivist — meaning the instrument's error rate is substantial?

Q36. The confidence intervals around the point estimates for individual scores are wide enough that the 'predicted' recidivism probability for [Respondent]'s score could range from [X%] to [Y%], correct?

Q37. So the specific number you told this court — for example, 'a [X%] chance of reoffending within 5 years' — is a point estimate within a confidence interval that could include substantially lower probabilities?

Topic 6: The Instrument Does Not Measure Mental Disorder Causation

Q38. The SVPA requires showing that the likelihood of reoffense results from a diagnosed mental disorder — not merely that the person has a history of offenses. Correct?

Q39. The Static-99R scores criminal history items, demographic characteristics, and victim characteristics. It does not measure the presence or severity of a mental disorder, correct?

Q40. It cannot tell you whether any risk elevation it predicts is caused by a mental disorder or simply by general antisocial behavior patterns?

Q41. A person with no diagnosable mental disorder but a long criminal history would score just as high on Items 3, 4, and 6 as a person with a severe paraphilic disorder, correct?

Q42. So the Static-99R cannot distinguish between someone whose risk is elevated because of a mental disorder and someone whose risk is elevated because of general criminality?

Q43. And it is that distinction — between mental-disorder-driven risk and general criminal risk — that the SVPA requires the evaluator to make?

P. Cross-Examining The Evaluator(S) On The STABLE-2007 Dynamic Risk Factors

The STABLE-2007 is a dynamic risk assessment instrument used by California SVP evaluators to assess thirteen stable dynamic risk factors for sexual recidivism. Unlike the Static-99R, which measures fixed, historical characteristics, the STABLE-2007 is designed to assess current, changeable conditions — factors that the research says should fluctuate based on treatment progress, current living circumstances, emotional state, and recent behavior. This distinction between static and dynamic assessment is not merely academic: it is the legal and scientific foundation for the entire purpose of using the STABLE-2007 in an SVP evaluation. Defense counsel must understand how the STABLE-2007 is supposed to be scored, what the research says about when scores are based on current versus historical data, and how to expose evaluators who rely exclusively on historical information to score current dynamic factors.

a. What the STABLE-2007 Is — Its Purpose and the Nature of Dynamic Risk Factors

The STABLE-2007 was developed by R. Karl Hanson, Andrew Harris, Terri-Lynne Scott, and Leslie Helmus (2007) as part of the Dynamic Supervision Project, a prospective study of over 1,000 sex offenders under community supervision in Canada. It was designed to complement the Static-99R by assessing changeable — 'stable dynamic' — risk factors: personal skill deficits, predilections, attitudes, and learned behaviors that correlate with sexual recidivism but that can be altered through treatment and supervision.

The Stable-2007 assesses 13 items organized across six domains of functioning. Each item is scored on a three-point scale: 0 = no problem evident; 1 = some problem evident; 2 = significant problem evident. The total score ranges from 0 to 26 (or 0 to 24 for individuals whose victims were not children under 14, as the 'emotional identification with children' item does not apply). The three score categories are: 0–3 = low need; 4–11 = moderate need; 12 or greater = high need.

STABLE-2007 Item	What It Measures	Defense Challenge if Based on History Only
1. Significant Social Influences	Whether the respondent's primary social network includes antisocial individuals or supports that encourage sexual offending	Current social network must be assessed — who does he associate with NOW?

STABLE-2007 Item	What It Measures	Defense Challenge if Based on History Only
2. Capacity for Relationship Stability	Ability to form and maintain stable, appropriate intimate relationships	Requires current evidence — treatment participation in relationship skills, current relationship status
3. Emotional Identification with Children	Whether the respondent relates emotionally to children as peers or in adult roles (applies only when prior victims under 14)	Must assess current emotional patterns, not just historical offense characteristics
4. Hostility Toward Women	Current attitudes of resentment, anger, or misogyny toward women	Current attitude — must be based on current interview, treatment records, or recent behavior, not historical offenses
5. General Social Rejection / Isolation	Current social isolation, feelings of rejection or inadequacy in social settings	Must reflect current social functioning — not history of antisocial behavior
6. Lack of Concern for Others	Current empathy deficits — whether the respondent shows concern for the welfare of others	Must be based on current behavioral observations, not historical offense characteristics
7. Impulsivity	Current difficulty with impulse regulation across multiple life domains	Must reflect current behavior — treatment gains in impulse control are relevant and must be considered
8. Poor Problem-Solving Skills	Ability to identify and apply solutions to interpersonal or practical problems	Current cognitive functioning — treatment improvement is directly relevant
9. Negative Emotionality / Hostility	Tendency toward anger, hostility, anxiety, or emotional dysregulation	Current emotional functioning — must be assessed in context of current state, not historical behavior
10. Sex Drive / Preoccupation	Preoccupation with sexual thoughts, urges, or fantasies in ways that interfere with functioning	Current assessment required — PPG, ABEL/AASI, or clinical interview evidence of CURRENT arousal patterns
11. Sex as Coping	Using sexual behavior as a primary mechanism for managing stress or emotional distress	Current coping patterns — treatment participation in healthy coping skills is directly relevant
12. Deviant Sexual Preference	Sexual attraction to stimuli outside the normal adult range (children, non-consent, etc.)	Most critical item — must be grounded in current arousal data, NOT just historical conviction characteristics
13. Cooperation with	Willingness to comply with	Most directly current item —

STABLE-2007 Item	What It Measures	Defense Challenge if Based on History Only
Supervision	supervision, treatment, and reporting requirements	current treatment compliance is the primary evidence base

Source: Hanson, Harris, Scott & Helmus (2007), Assessing the Risk of Sexual Offenders on Community Supervision: The Dynamic Supervision Project; iResearchNet, STABLE-2007 and ACUTE-2007 Instruments; Brankley, Babchishin & Hanson (2021), STABLE-2007 Demonstrates Predictive and Incremental Validity.

b. The Core Argument: Dynamic Factors Must Be Based on Current Empirical Data

The entire clinical and legal rationale for using the STABLE-2007 in SVP evaluations rests on a single premise: because it measures changeable factors, it can reflect the respondent's current risk profile, not merely his historical risk profile. This premise is the reason the STABLE-2007 is administered in addition to the Static-99R — the Static-99R captures historical, static risk; the STABLE-2007 captures current, dynamic risk. Together, they are supposed to provide the evaluator — and the court — with a fuller, more current picture of the respondent's risk level.

This design premise has a critical corollary that evaluators frequently violate: if the STABLE-2007 is to serve its intended function of capturing current risk, its items must be scored based on current empirical evidence of the respondent's present status on each factor. An evaluator who scores STABLE-2007 items based solely on historical offense data — using the respondent's pattern of past offenses and old records to assign current scores — is not performing a dynamic assessment. The evaluator is performing a static assessment of historical information using a tool designed for dynamic assessment of current information. The result is an assessment that defeats the instrument's purpose and inflates risk scores by anchoring them to historical conduct rather than current functioning.

● **KEY POINT:** The STABLE-2007 is a DYNAMIC risk instrument. Its scores are supposed to reflect the respondent's CURRENT status on each of the 13 factors. When an evaluator scores STABLE-2007 items based primarily or exclusively on historical offense patterns, prior evaluation reports, or static criminal record data — rather than current behavioral evidence, treatment records, recent clinical interviews, or current psychological testing — the evaluator is misusing the instrument. A STABLE-2007 score grounded in history is not a dynamic risk assessment; it is a static assessment in disguise.

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c. What the Research Shows About the Importance of Current Data in STABLE-2007 Scoring

The research literature on the STABLE-2007 provides specific support for the argument that dynamic risk assessments must be grounded in current data to be valid:

1. Dynamic Risk Scales Decay Over Time Without Reassessment

Babchishin and Hanson (2020), in research published under the title 'Dynamic Risk Scales Decay Over Time: Evidence for Reassessment,' established that STABLE-2007 and ACUTE-2007 scores based on earlier assessments become less predictively accurate over time. The most recent assessments are the most accurate predictors of recidivism. The instrument's own developers concluded: 'The most recent assessments were the most accurate' and 'Models with fully dynamic STABLE-2007 scores were better fitting models for sexual, violent, and any recidivism than the baseline models.' An evaluator who bases a current STABLE-2007 assessment primarily on historical data is, by the developers' own research, producing a less accurate risk prediction than one grounded in current information.

The same research recommended reassessment of the STABLE-2007 every 6 to 12 months, reflecting the view that current status — not historical status — is the appropriate evidence base for dynamic factor scoring. (Public Safety Canada, 'Dynamic Risk Scales Decay Over Time: Evidence for Reassessment,' 2023-R003.)

2. Dynamic Factors Were Developed and Validated in Community Supervision Contexts

The STABLE-2007 was developed and validated in the Dynamic Supervision Project (Hanson et al., 2007) using data from offenders under active community supervision. Supervision officers scored the items based on regular, direct contact with the offenders — current interviews, current behavioral observations, and current case management interactions. The instrument was not developed and validated using only historical record review. When SVP evaluators administer the STABLE-2007 based solely on file review and records — without current clinical interviews, without current treatment data, without current psychometric testing — they are departing from the conditions under which the instrument was validated.

3. Treatment Participation Is Directly Relevant to Multiple STABLE-2007 Items

The purpose of STABLE-2007 items is not merely to assess deficits as historical features of the respondent's personality but to identify targets for treatment intervention

and to reflect changes in those areas resulting from treatment. Items such as Impulsivity (Item 7), Poor Problem-Solving Skills (Item 8), Sex as Coping (Item 11), and Cooperation with Supervision (Item 13) are explicitly designed to be sensitive to treatment-related improvement. Hanson, Harris, Scott and Helmus (2007) wrote that the STABLE factors are 'personal skill deficits, predilections, and learned behaviors that correlate with sexual recidivism but that can be changed through a process of effortful intervention.'

When an evaluator fails to consider documented treatment participation, treatment progress reports, and treatment-related behavioral change in scoring these items — instead assigning scores based on historical offense patterns — the evaluator is treating a dynamic, treatment-sensitive instrument as if it were a static, history-based tool. The resulting inflated scores do not reflect the respondent's current risk; they reflect the evaluator's failure to gather and weigh current empirical evidence.

4. The Moderate Predictive Validity of the STABLE-2007 Depends on Proper Scoring

Meta-analyses have found that the STABLE-2007 has moderate predictive validity for sexual recidivism, with AUC values around .67 (Rettenberger and Craig, 2017; Brankley, Babchishin & Hanson, 2021). Interrater reliability across four studies has a median ICC of .90, suggesting excellent agreement when the instrument is used as designed. However, the predictive validity and reliability figures apply to the instrument as intended — based on current behavioral data gathered through direct contact with the individual. When evaluators substitute historical file review for the current behavioral evidence the instrument requires, there is no empirical basis for assuming that the resulting scores retain the predictive validity documented in the research literature.

Further, at least one study found that the STABLE-2007 'did not significantly predict increased sexual violence' in incarcerated samples when other instruments were included (Sowden and Olver, 2017, as cited in Predictive Validity of Stable-2007 in Incarcerated Samples). For individuals who are institutionalized — as California SVP respondents are — the dynamic behavioral evidence the STABLE-2007 depends on for accurate scoring is severely limited. An individual in institutional confinement cannot demonstrate current functioning in the social, intimate, and emotional domains the STABLE-2007 assesses in the same way that someone under community supervision can.

d. The Defense Argument: When Evaluators Cannot Find Current Data, They Must Not Inflate Scores

A recurring problem in SVP evaluations is that evaluators who cannot locate current empirical data on a given STABLE-2007 factor default to historical offense patterns to justify elevated scores. For example:

- **Deviant Sexual Preference (Item 12):** When current physiological testing (PPG) or validated actuarial assessment (ABEL/AASI-3) data is available and shows no deviant arousal, the evaluator should score this item based on the current data. When evaluators instead score Item 12 at 2 ('significant concern') based solely on the nature of the historical index offense — arguing that the convictions themselves prove current deviant preference — they are treating a dynamic factor as if it were a static one and ignoring the current empirical evidence that is available.
- **Sex Drive / Preoccupation (Item 10):** When the respondent has participated in treatment and treatment records show improved sexual self-regulation, the evaluator who ignores that evidence and scores Item 10 at 2 based on historical offense frequency is substituting old data for current data in violation of the instrument's design.
- **Cooperation with Supervision (Item 13):** This item is the most directly current-oriented in the entire instrument. It should be scored based on the respondent's compliance with supervision, treatment, and reporting in the recent period. An evaluator who scores this item based on historical noncompliance with parole conditions years ago, while ignoring documented current treatment participation, is misusing the instrument.
- **Emotional Identification with Children (Item 3):** When no current clinical interview or current assessment data addresses this item, and the evaluator scores it at 2 based on the historical conviction characteristics alone, the evaluator has used a historical data point to fill a gap that the instrument requires to be filled by current evidence. The correct approach when current data is insufficient is to acknowledge the limitations of the assessment — not to import historical data and present it as a dynamic, current finding.

⚠ **Defense Counsel's Core Argument:** When an evaluator uses historical offense data to score a STABLE-2007 item because current empirical data is not available, the evaluator is not conducting a dynamic risk assessment — the evaluator is conducting a static risk assessment with a dynamic tool. The resulting inflated score does not reflect the respondent's current dynamic risk level. It reflects the evaluator's choice to

substitute historical data for the current behavioral evidence the instrument requires. Defense counsel must challenge this substitution item by item, asking for each elevated score: 'What current empirical evidence supports this score?'

e. Cross-Examination Questions on the STABLE-2007

Topic 1: The Nature and Purpose of Dynamic Risk Assessment

Q1. You administered the STABLE-2007 in this evaluation, correct?

Q2. The STABLE-2007 is a dynamic risk assessment instrument — it is designed to assess factors that change over time, correct?

Q3. The term 'dynamic' means the factors are supposed to reflect the respondent's current status — not fixed, historical characteristics?

Q4. The STABLE-2007's developers wrote that the factors it measures are 'personal skill deficits, predilections, and learned behaviors that correlate with sexual recidivism but that can be changed through a process of effortful intervention.' Correct?

Q5. So the entire purpose of using the STABLE-2007 rather than relying solely on the Static-99R is to capture the respondent's current risk level, not just his historical risk?

Q6. And that means the STABLE-2007 scores must be based on current evidence — current behavioral data, current clinical observations, current testing — not just historical records?

Topic 2: The Temporal Basis of Each Score

Q7. Let me go through each of the 13 items you scored. For each item, I want to know: what is the current empirical evidence — meaning evidence from the last 12 to 24 months — that supports the score you assigned?

Q8. Starting with Item 12, Deviant Sexual Preference, which you scored [X]: what current evidence of deviant arousal patterns supports that score?

Q9. Did you review any current physiological testing, such as penile plethysmography (PPG) results?

Q10. Did you review current psychological testing such as the ABEL Assessment for Sexual Interest (AASI-3)?

Q11. If the AASI-3 results show negative Z-scores for prepubescent categories — meaning no measured sexual interest in children at the time of testing — how did you account for that data in your scoring of Item 12?

Q12. If you scored Item 12 at [2/1] based primarily on the historical offense characteristics — the victims' ages at the time of conviction — rather than current arousal data, how is that a dynamic assessment rather than a static one?

Q13. For Item 13 — Cooperation with Supervision — what is the basis for your score?

Q14. Did you review [Respondent]'s treatment participation records from his current institutional placement?

Q15. Did you speak with his treatment providers about his current treatment engagement?

Q16. If [Respondent] has been actively participating in treatment and treatment providers describe him as cooperative, how does that affect your Item 13 score?

Q17. If you scored Item 13 based on historical supervision compliance violations from years ago, rather than his current treatment cooperation, you are scoring a current-behavior item based on old data, correct?

Topic 3: The Historical Data Substitution Problem

Q18. For each item you scored at 1 or 2 — indicating some or significant concern — can you tell me specifically: is the evidence you relied on current evidence or historical evidence?

Q19. When you could not find current empirical evidence of a particular dynamic risk factor, what did you do?

Q20. Did you lower the score to reflect the absence of current evidence? Or did you maintain an elevated score based on historical data?

Q21. If you maintained an elevated score when you could not find current evidence, you were using historical data to fill a gap in your current evidence base, correct?

Q22. The STABLE-2007's developers — Babchishin and Hanson — published research finding that dynamic risk scores 'decay over time' and that 'the most recent assessments are the most accurate.' Were you aware of that?

Q23. That means a score based on historical data from years ago is less predictively accurate than a score based on current evidence?

Q24. So when you present this STABLE-2007 score to the court as evidence of [Respondent]'s current risk, you are presenting a score that — to the extent it is

based on historical rather than current data — is, by the developers' own research, less accurate than it would be if based on current evidence?

Topic 4: Treatment Progress and Its Relevance to Scores

Q25. Are Items 7, 8, 11, and 13 — Impulsivity, Problem-Solving, Sex as Coping, and Cooperation with Supervision — specifically designed to be sensitive to treatment-related change?

Q26. That is, if someone improves their impulse regulation skills in treatment, their score on Item 7 should go down?

Q27. If someone develops healthy coping mechanisms that no longer involve sexual behavior, their score on Item 11 should go down?

Q28. Did you obtain and review [Respondent]'s treatment records from [treatment program]?

Q29. Those records reflect his progress in the skill areas these items measure, correct?

Q30. If [Respondent] has documented progress in the treatment curriculum on impulse regulation, problem-solving, and healthy coping, and you did not factor that progress into your scores, your scores do not reflect his current status on those factors?

Q31. You have said that [Respondent] is at a [high/moderate] need level on the STABLE-2007. But if the treatment records show improvement in the specific areas the STABLE-2007 measures, how do you reconcile those two conclusions?

Topic 5: The Institutional Confinement Problem

Q32. The STABLE-2007 was developed and validated using data from offenders under active community supervision — people living in the community who had regular contact with supervision officers who observed their current behavior, correct?

Q33. [Respondent] has been in institutional confinement at [institution] for [X] years, correct?

Q34. During that time, he has not had the opportunity to demonstrate current functioning in the social, intimate relationship, and community domains that the STABLE-2007 factors address in a real-world context?

Q35. For example, Item 2 — Capacity for Relationship Stability — is difficult to assess for someone in institutional confinement who has no access to the kind of intimate relationship the item addresses?

Q36. When someone cannot demonstrate the behaviors the instrument is designed to assess — because they are institutionalized — is it scientifically appropriate to use the absence of that opportunity as a basis for an elevated score?

Q37. Sowden and Olver (2017) found that the STABLE-2007 did not significantly predict increased sexual violence in incarcerated samples. Were you aware of that?

Q38. If the instrument's predictive validity is reduced for incarcerated populations — which is where you are applying it — how do you justify using it with the same confidence level you would apply in a community supervision context?

Topic 6: Item-by-Item Challenge on Score Basis

Q39. Let me ask about your basis for each item specifically. For Item 1 — Significant Social Influences — you scored [X]. What current evidence shows who [Respondent] associates with and whether those associations support sexual offending?

Q40. For Item 4 — Hostility Toward Women — you scored [X]. What current evidence — from interviews, current behavioral records, or direct observation — supports that score?

Q41. For Item 6 — Lack of Concern for Others — you scored [X]. What current evidence of empathy deficits supports that score, as opposed to historical offense characteristics?

Q42. For Item 9 — Negative Emotionality / Hostility — you scored [X]. What current clinical interview data or current psychological testing supports that score?

Q43. For Item 10 — Sex Drive / Preoccupation — you scored [X]. What current evidence of sexual preoccupation supports that score, if the current AASI-3 data does not show elevated interest in deviant sexual categories?

Q44. In each of these cases, if you answer 'the historical offense pattern' — you are admitting that you used historical data to score current dynamic factors, correct?

Topic 7: Concluding Challenges on the Combined Score

Q45. You calculated a total STABLE-2007 score of [X], placing [Respondent] in the [low/moderate/high] need category. Correct?

Q46. If we subtract the scores you assigned based on historical data rather than current empirical evidence, and replace them with scores that reflect the current

evidence — including treatment progress, current testing, and current behavioral records — what would the total score be?

Q47. You cannot answer that question, because you have not gathered the current empirical evidence that would allow you to properly score those items dynamically?

Q48. So when you present this STABLE-2007 score as evidence of [Respondent]'s current risk, what you are actually presenting is a score that reflects historical data scored on a dynamic tool — not a genuine current dynamic risk assessment?

Q49. And you are asking this court to find probable cause to continue [Respondent]'s civil commitment — in part based on a risk score that you cannot demonstrate is grounded in current behavioral evidence?

Across all three subsections — volitional impairment, the Static-99R, and the STABLE-2007 — the defense theme is the same: the evaluator's conclusions are more confident than the scientific evidence supports, and each conclusion rests on methodological problems that the published peer-reviewed literature has specifically identified. Defense counsel who make this argument systematically, item by item, question by question, give the trier of fact the tools to understand why the evaluation does not establish the legal predicates for SVP commitment.

SECTION 4: GOOD CAUSE FOR CONTINUANCES

One of the most powerful — and underutilized — defense strategies available in SVPA proceedings is the strategic continuance. California's Sexually Violent Predator Act imposes specific procedural requirements for continuances, but it also provides an explicit statutory and constitutional framework that defense counsel can use to keep a case from going to trial while the respondent engages in treatment. When the client's goal is to enter treatment, advance through the program, and cause the evaluators to flip their opinions before trial ever occurs, the continuance is not a delay tactic — it is a legitimate defense strategy expressly recognized by the California Supreme Court. This section explains how to pursue that strategy, what legal authority supports it, and what to do when a court or the prosecution pushes back.

A. The Statutory Framework: Welfare and Institutions Code Section 6603

California Welfare and Institutions Code Section 6603 governs the conduct of SVP commitment trials and the procedure for obtaining continuances. Section 6603(c) sets forth the mandatory requirements that must be satisfied to obtain a continuance of trial. These requirements are not optional — they are conditions that must be met and put on the record or the continuance cannot be granted.

Statutory Requirements Under WIC § 6603(c)

To continue an SVP trial, defense counsel must satisfy each of the following:

1. **Written Notice Required:** Written notice of the motion for continuance must be filed and served on all parties to the proceeding. This is not a request that can be made casually from counsel table — it must be a formal, filed document.
2. **Affidavits or Declarations Required:** The written notice must be accompanied by affidavits or declarations detailing specific facts showing that a continuance is

necessary. General assertions are not sufficient. The declaration must articulate concrete, specific reasons grounded in actual facts.

3. **Service and Filing Deadline:** All moving and supporting papers must be served and filed at least 10 court days before the hearing on the motion. If served by mail within California, the notice period is increased by five calendar days.
4. **Good Cause Must Be Shown:** Continuances shall be granted only upon a showing of good cause. Critically, the court shall not find good cause solely based on the convenience of the parties or a stipulation of the parties. A joint agreement of counsel that they want more time is not, by itself, sufficient.
5. **Court Must State Findings on Record:** If a continuance is granted, the court shall state on the record the facts proved that justify the length of the continuance. The court's good cause finding must be on the record — this is essential for appellate review if the court later denies a continuance.

The statute also defines what constitutes 'good cause.' Under WIC § 6603(c)(8), good cause includes — but is not limited to — cases in which the attorney assigned to the case has another trial or probable cause hearing in progress. However, this is a non-exhaustive list, and the California Supreme Court has addressed what else can constitute good cause in the SVP context.

● **KEY POINT:** WIC § 6603(c) requires that good cause for a continuance be stated on the record with specific facts. Every time a continuance is sought based on the respondent's participation in treatment, defense counsel must have a current declaration documenting the treatment status, progress, and why additional time is needed for that treatment to affect the evaluators' opinions. Conclusory statements are not sufficient. Specific facts must be in the record.

B. The Camacho Framework: What the California Supreme Court Held

Camacho v. Superior Court — (2023) 15 Cal.5th 354, S273391

In *Camacho v. Superior Court* (2023) 15 Cal.5th 354, the California Supreme Court addressed — for the first time — the constitutional framework for evaluating the timeliness of SVP trials. The case involved Ciro Camacho, who was first committed as an SVP in 2005, and then faced a recommitment petition filed in 2007 following the passage of Proposition 83. From 2007 through the time the Supreme Court reviewed the case, the trial on the recommitment petition had not yet occurred — a delay of more

than 15 years. Throughout that period, the defense had repeatedly requested or agreed to continuances.

Camacho argued that the extended pretrial delay violated his constitutional due process right to a timely trial. The California Supreme Court held that SVP respondents do have a due process right to a timely trial. However, the Court also held that whether a pretrial delay violates that right depends on the reasons for the delay — and critically, the Court held that there is no presumption of prejudice for either party from delay in SVP proceedings.

Key Holdings of *Camacho* Relevant to the Good Cause Continuance Strategy

- **No Presumption of Prejudice for Either Side:** The Supreme Court expressly disapproved prior Court of Appeal decisions that had applied a presumption of prejudice when evaluating due process claims based on delays in SVP trials. The Court held that no such presumption applies. This means the prosecution cannot simply assert that delay prejudices the People — the prosecution must actually demonstrate specific, concrete prejudice. A prosecutor who argues that delay is automatically prejudicial is wrong as a matter of California Supreme Court precedent.

- **Defense-Requested Continuances Weigh Against the Respondent's Speedy Trial Claim:** The Court applied the *Barker v. Wingo* (1972) 407 U.S. 514 four-factor balancing test: (1) length of delay; (2) reason for delay; (3) whether the respondent asserted the right to timely trial; and (4) prejudice to the respondent. Because the defense had requested or agreed to the overwhelming majority of continuances in Camacho's case, those delays were attributed to the respondent. This is the flip side of the coin: a respondent who wants continuances and obtains them cannot later claim those continuances violated his speedy trial right.

- **Receiving Mental Health Services During Delay Is a Factor Against Finding Prejudice:** In analyzing prejudice to Camacho, the Court specifically noted that he 'was receiving mental health services' during the period of delay. This is significant: the fact that the respondent was in treatment at Coalinga State Hospital during the continuance period was treated as a factor reducing prejudice from the delay. The Court recognized that institutional placement for treatment is not equivalent to pretrial incarceration pending criminal trial.

- **A Favorable Expert Report Obtained During the Continuance Period Was Noted as a Benefit:** The Court noted that Camacho 'did not receive a beneficial medical evaluation until 2015' — referring to the first evaluator's report concluding he no longer met SVP criteria. This report was obtained after years of continuances, during which Camacho had been in treatment at the state hospital. The Court treated this as relevant to whether the continuance period had been prejudicial. This creates an important inference: obtaining a favorable evaluation — precisely what the treatment strategy is designed to produce — during a period of continuances is consistent with the purposes of the delay.

- **The Trial Court's Responsibility to Guard Against Unjustified Delay:** The Court underscored the vital role of trial courts in safeguarding the timely trial right, stating that the trial court 'must take due account of the individual's interests in prompt adjudication and take decisive steps to guard against unjustified delay.' This language cuts both ways: it gives the trial court authority to push a case toward trial, but it also means the trial court must carefully analyze whether delay is justified — not simply deny continuances because the DA wants to go to trial.

C. The Treatment-to-Flip Strategy: Using Camacho Affirmatively

The practical reality of SVP proceedings at Coalinga State Hospital is this: many respondents arrive following a probable cause finding and immediately engage in treatment programming. The treatment programming at Coalinga is structured in modules, with advancement through the modules requiring sustained engagement and demonstrated progress. Evaluators — who conduct annual evaluations of each committed individual — pay attention to treatment progress. When a respondent advances to Module II or Module III, or demonstrates sufficient treatment gains, evaluators who previously found the respondent to be an SVP will, in many cases, conclude upon reassessment that the respondent no longer meets the SVP criteria.

This is the 'flip' that defense counsel should be working toward: the evaluators change their opinions based on treatment progress, and when both evaluators conclude the individual no longer meets SVP criteria, the legal basis for continued commitment evaporates. At that point, counsel can approach the District Attorney and the court and seek dismissal of the petition without trial.

Camacho supports this strategy in the following specific ways that counsel can use in court:

> First, there is no presumption that delay prejudices the prosecution. The DA's objection to a continuance based on generalized prejudice — 'the People need to go to trial, this case has been pending too long' — is not legally sufficient under Camacho. The prosecution must identify specific prejudice, and the unavailability of witnesses, memory loss, or other concrete harms must be demonstrated on the record.

> Second, the respondent's engagement in treatment during the continuance period affirmatively reduces any finding of prejudice to the respondent. The respondent is not languishing in a cell — he is actively receiving mental health services that the law says he needs, and that treatment may lead to an outcome favorable to both the respondent and the interests of justice.

> Third, the purpose of the delay — to allow the respondent to engage in treatment so that his risk level decreases and the evaluators' opinions may change — is not arbitrary or merely tactical. It serves the statutory purpose of the SVP Act, which provides for indefinite commitment subject to annual reevaluations and the possibility of release when the individual no longer meets the criteria. Obtaining favorable evaluations through treatment is exactly what the statutory scheme is designed to allow.

> Fourth, if the evaluators flip and the petition is dismissed before trial, both the respondent's liberty interest and the state's interest in not committing persons who no longer meet SVP criteria are served. The prosecution has no legitimate interest in committing a person who the evaluators — the state's own experts — conclude no longer meets the definition of a sexually violent predator.

✔ **PRACTICE NOTE:** Every continuance motion based on the treatment strategy should be supported by a declaration from the respondent's treatment provider or a declaration from counsel setting forth: (1) the module or treatment phase the respondent is currently in; (2) the specific treatment programming in which he is participating; (3) the treatment gains he has demonstrated; (4) what additional time in treatment is expected to produce; and (5) why a favorable change in the evaluators' opinions is reasonably anticipated with continued treatment. This record is essential both to demonstrate good cause and to protect against a later claim of unjustified delay.

D. The Declaration in Support of the Good Cause Continuance Motion

The declaration supporting the continuance motion is the most critical document in this process. WIC § 6603(c) specifically requires affidavits or declarations detailing specific facts showing that a continuance is necessary. A bare assertion that the respondent is in treatment is not sufficient. The declaration must be specific.

Essential Elements of the Treatment-Based Continuance Declaration

1. **Current Treatment Status:** State specifically what module or phase of treatment the respondent is in, and when he entered that phase. 'Mr. [Name] is currently enrolled in Module III of the “Better Life” treatment program at Coalinga State Hospital, having advanced to that module in [month/year].'
2. **Active Participation:** State the specific groups, classes, or programming sessions the respondent is attending. 'He is actively participating in [group names], which meet [frequency]. He has completed [X] of [Y] required sessions in the current period.'
3. **Treatment Progress:** Reference any treatment progress reports, facilitator assessments, or other documentation that reflects the respondent's engagement and progress. 'Monthly PSR Notes from his treatment facilitators reflect [describe progress].
4. **Anticipated Evaluator Response:** State why a continuance is necessary for the evaluation process to reflect the treatment progress. 'The Department of State Hospitals evaluators conduct annual reassessments. [Respondent]'s current treatment progress has not yet been reflected in the most recent evaluation, which was completed in [date]. A continuation of [X months] would allow sufficient time for the evaluators to reassess [Respondent]'s current risk level in light of his documented treatment progress.'
5. **Camacho Citation:** Expressly cite *Camacho v. Superior Court* (2023) 15 Cal.5th 354 for the proposition that this continuance request does not carry a presumption of prejudice, and that allowing the respondent to continue receiving mental health services consistent with the statutory scheme is a legitimate basis for the continuance.
6. **Client Consent:** State that the continuance is made with the respondent's full knowledge and consent, and that the respondent has been advised of his due process right to a timely trial and has chosen to pursue the treatment strategy.

E. When the Court Denies the Continuance: The Writ of Mandate

If defense counsel has made a proper record — filed a compliant motion with a detailed declaration, cited the applicable law including WIC § 6603(c) and Camacho, argued specifically why the treatment-based continuance constitutes good cause, and the court nonetheless denies the motion and orders the case to trial — the next step is a Petition for Writ of Mandate in the Court of Appeal.

Legal Basis for the Writ

A writ of mandate is appropriate when a trial court has abused its discretion in denying a continuance that was supported by good cause. In the SVP context, the *Camacho* decision itself arose from a petition for writ of mandate — Camacho filed a petition for writ of mandate in the Court of Appeal after the trial court denied his motion to dismiss, and the California Supreme Court granted review of the resulting appellate court denial. This illustrates that the writ is a recognized vehicle for challenging trial court errors in the management of SVP proceedings.

Code of Civil Procedure Section 1085 authorizes a writ of mandate to compel a court to perform a ministerial duty or to correct an abuse of discretion. In the context of a continuance denial, the argument is that the trial court abused its discretion by finding no good cause when the record established specific, documented good cause under WIC § 6603(c), and when the continuance would allow the respondent to continue receiving mental health treatment consistent with the statutory scheme and with the framework established in *Camacho*.

What Must Be in the Writ Record

1. **The Motion and Supporting Declaration:** The writ petition must include the motion for continuance and the supporting declaration as exhibits, showing what was presented to the trial court.
2. **The Reporter's Transcript of the Denial Hearing:** The court's statement of reasons for denying the continuance must be in the record. If the court failed to address the Camacho framework or the treatment-based rationale, that failure is itself a basis for appellate relief.
3. **The Camacho Argument:** The petition must specifically argue that the trial court's denial was inconsistent with *Camacho v. Superior Court* (2023) 15 Cal.5th 354 — particularly the holding that there is no presumption of prejudice and that

receiving mental health services during the continuance period reduces, rather than creates, prejudice.

4. **The WIC § 6603(c) Compliance Showing:** The petition must demonstrate that the motion complied with each procedural requirement of Section 6603(c) — written notice, specific declaration, timely filing — and that despite statutory compliance, the court denied the motion without adequate factual basis.
5. **Immediate Relief Sought:** The writ petition should seek an immediate stay of the trial date pending review, to prevent the respondent from being forced to trial while the writ is pending.

✔ **PRACTICE NOTE:** Do not wait until the day before trial to seek writ relief. Once the continuance is denied and a trial date is set, move immediately to file the writ petition and seek an emergency stay. The Court of Appeal can act quickly in these circumstances, but only if counsel acts quickly. File the writ petition within days of the denial, not weeks.

F. Counseling the Client: When the Strategy May Not Work

The treatment-to-flip strategy is powerful but not guaranteed. Defense counsel has an obligation to counsel the client honestly about the risks and the alternatives. Specifically, counsel must advise the client of the following:

- **Evaluators Do Not Always Flip:** Not every evaluator will change their opinion even when a respondent has made substantial treatment progress. Some evaluators will continue to find that the respondent meets SVP criteria regardless of treatment gains. Defense counsel must assess, based on the specific evaluators assigned to the case and any previous annual reports, whether a flip is realistic.

- **Treatment Progress Must Be Genuine and Documented:** Evaluators are experienced clinicians. They can distinguish between genuine treatment engagement and superficial participation aimed at obtaining a favorable report. If the respondent is not genuinely engaged in treatment — if he is going through the motions — the strategy is unlikely to succeed, and the continuances will ultimately run out.

- **If the Strategy Fails, the Case Goes to Trial:** If the court denies the continuance and the writ fails, or if the client chooses not to pursue further continuances, the case will go to trial. Counsel must be prepared to try the case. The continuance strategy and the trial preparation strategy must proceed in parallel, not sequentially. Counsel who has pursued only continuances and done no trial preparation is not prepared for the eventuality that trial must occur.

- **The Client's Choice Controls:** Ultimately, the decision whether to seek continuances and pursue the treatment strategy, or to push for a speedy trial, belongs to the client. Some clients want their day in court as quickly as possible. Others prefer to remain at Coalinga in treatment status while working toward a flip. Counsel must present both options clearly, explain the legal framework, and then follow the client's informed decision.

⚠ **Critical Advisement:** If the client chooses to pursue continuances and the treatment strategy, that decision should be memorialized in writing — a letter to the client confirming the strategy discussed, the client's consent to the continuances, and the client's understanding that continuances attributable to the defense will be counted against the defense if the client later attempts to assert a speedy trial violation. *Camacho* makes clear that defense-requested continuances are attributed to the respondent under *Barker v. Wingo*.

SECTION 5: PREPARATION AND DEFENDING IN THE COMMITMENT TRIAL

If the treatment strategy does not produce evaluator flips in time, or if the client chooses to go to trial, defense counsel must be prepared to try an SVP commitment case before a jury. Trial preparation in an SVP commitment case mirrors — and builds on — the preparation that counsel undertook for the probable cause hearing. The same evidentiary challenges apply. The same expert cross-examination strategies apply. But trial presents additional opportunities that were not available at the probable cause hearing, particularly when the respondent has been in treatment at Coalinga State Hospital and has participated in group programming. This section addresses trial preparation from the ground up, with specific attention to the additional evidence available when a client has been in treatment.

A. Trial Preparation Mirrors PCH Preparation — Then Goes Further

Everything covered in Section 3 of this handbook — the *Ghilotti* motion challenges, the motion in limine on pedophilic disorder diagnoses, the hearsay framework, the cross-examination strategies on volitional impairment, the Static-99R, and the Stable-2007 — applies with equal force at trial. The probable cause hearing is designed to determine whether there is sufficient evidence to hold the respondent for trial. Because the PCH uses the same experts, the same reports, and the same evidentiary framework as trial, a properly conducted PCH is essentially a dress rehearsal for trial.

Defense counsel who handled the PCH has an advantage at trial: counsel already knows the evaluators' opinions, the evidentiary basis for those opinions, the weaknesses exposed on cross-examination at the PCH, and the specific arguments the prosecution intends to make. Every concession obtained from an evaluator at the PCH through cross-examination is a building block for trial. If the evaluator made a significant admission at the PCH, that testimony is on the record and can be used to impeach the evaluator if the evaluator attempts to take a stronger position at trial.

The additional dimension at trial — beyond what was available at the PCH — is the treatment record. If the respondent has been at Coalinga and has participated in group programming, that participation generates a body of documentary and testimonial evidence that was not available at the time of the PCH. Defense counsel must gather and assess this evidence early, before trial.

B. The Treatment Record as Trial Evidence: PSR Notes

Every month, the facilitators of each treatment group at Coalinga State Hospital write a Progress Summary Report, commonly known as a PSR Note, on each group participant. The PSR Note documents how the individual is doing in the group — his engagement level, the quality of his work and contributions, his behavioral presentation, and his progress toward treatment goals. Over time, PSR Notes create a longitudinal record of the respondent's treatment trajectory that can be powerful trial evidence.

What PSR Notes Document

PSR Notes written by facilitators can document a wide range of clinically relevant observations, including:

- **Treatment Engagement:** Whether the respondent actively participates in group sessions, completes assignments, contributes meaningfully to group discussions, and demonstrates investment in the treatment process.
- **Skill Acquisition:** Progress in developing the skills addressed in each group — impulse regulation, empathy, healthy coping strategies, relapse prevention, pro-social relationship skills, and offense-specific understanding.
- **Behavioral Presentation:** The respondent's demeanor, attitude toward treatment, responsiveness to feedback, and ability to apply what he is learning to his self-presentation and interactions.
- **Treatment Goals:** Progress toward the specific treatment goals identified at the beginning of each module, and whether the respondent has achieved those goals.
- **Absence of Concerning Behaviors:** Perhaps most importantly for trial: PSR Notes that do not document deviant sexual preoccupation, hostility toward women, emotional identification with children, or other Stable-2007 dynamic risk

factors are affirmative evidence that those factors are not currently present at concerning levels.

How to Obtain PSR Notes

PSR Notes are part of the respondent's treatment record at Coalinga State Hospital. They can be subpoenaed from the California Department of State Hospitals in the respondent's underlying SVP case. Defense counsel should issue a subpoena duces tecum to the custodian of records at Coalinga State Hospital, requesting all PSR Notes and progress notes from all groups in which the respondent has participated, for the entire period of his commitment.

✔ **PRACTICE NOTE:** Subpoena the PSR Notes early. Do not wait until the month before trial. The subpoena process can take time, the records may be voluminous, and counsel needs time to review them, identify the most significant entries, and determine which facilitators are worth calling as witnesses. Issue the subpoena as soon as a trial date is set.

C. Calling Facilitators as Defense Witnesses: The Critical Importance of Investigator Pre-Interview

The facilitators who authored PSR Notes can be called as defense witnesses at trial. A facilitator who has observed the respondent in weekly group sessions over months or years has firsthand, direct knowledge of the respondent's current behavioral presentation, treatment engagement, and symptom presentation in a structured therapeutic setting. This is exactly the kind of current, dynamic evidence that should be considered in assessing whether the respondent continues to meet SVP criteria — and it is evidence the evaluators in many cases have not reviewed, or have given inadequate weight.

However, calling a facilitator as a witness is not without risk. Facilitators may be State employees of the Department of State Hospitals. Their loyalties — consciously or unconsciously — may align more with the institution than with the respondent. A facilitator who says one thing to defense counsel during an informal conversation may say something quite different when called to testify. Defense counsel must plan for this possibility and protect against it.

⚠ **Critical Risk:** Never call a treatment facilitator as a witness at trial without first having the facilitator interviewed by a licensed private investigator. A facilitator who gives favorable information to defense counsel during a pre-trial conversation and then gives contradictory or damaging testimony on the stand can seriously harm the defense case. The investigator interview is not optional — it is essential.

The Investigator Pre-Interview: Purpose and Procedure

The purpose of having a licensed private investigator interview the facilitator before trial is threefold:

1. **To Determine What the Facilitator Will Actually Say:** The investigator asks the facilitator the same questions counsel would ask at trial. This gives defense counsel a preview of the facilitator's anticipated testimony before counsel commits to calling the facilitator. If the facilitator's actual testimony is likely to be neutral or unfavorable, counsel can decide not to call the facilitator — and avoid the damage.
2. **To Create a Recorded Baseline:** The investigator's interview of the facilitator, if conducted properly and documented in a written report, creates a record of what the facilitator said before trial. If the facilitator then testifies to something different on the stand — something more favorable to the prosecution, or inconsistent with the pre-trial statement — the investigator can be called to testify about the prior inconsistent statement.
3. **To Identify the Strongest Facilitator Witnesses:** Not all facilitators will be equally useful. Some may have had limited interaction with the respondent. Others may have extensive direct observation and strong favorable opinions. The investigator interviews allow counsel to identify the one or two facilitators whose testimony will be most impactful and focus the trial strategy on those witnesses.

The Prior Inconsistent Statement Strategy

If a facilitator is interviewed by the investigator before trial and makes statements favorable to the respondent — for example, that the respondent is genuinely engaged in treatment, shows no concerning sexual preoccupation, demonstrates empathy and self-regulation, and does not present behavioral indicators of high dynamic risk — and then the facilitator takes the stand and contradicts those statements in ways that are more favorable to the prosecution, defense counsel has a powerful tool: the prior inconsistent statement.

The legal framework for this is straightforward:

> California Evidence Code Section 1235 provides that a prior inconsistent statement of a witness is not excluded by the hearsay rule when offered as substantive evidence, if the witness has an opportunity to explain or deny the statement. At trial, if the facilitator testifies inconsistently with what was said during the investigator interview, counsel can impeach the facilitator with the prior statement and call the investigator to testify about what the facilitator actually said before trial.

> This has two effects: first, it impeaches the facilitator's credibility in the eyes of the jury; second, the investigator's testimony about the prior statement becomes independent evidence that the jury can weigh in the defense case. A jury that sees a state employee say one thing to an investigator and then say something different on the stand will question the witness's reliability and the objectivity of the testimony.

✔ **PRACTICE NOTE:** The investigator's report of the pre-trial interview must be detailed. The investigator should document the date, time, location, and full substance of the conversation, including direct quotes where possible. The report should be preserved as a written record from the date of the interview. If the facilitator later attempts to deny or minimize what was said, the contemporaneous investigator report provides the most reliable documentation of what actually occurred.

D. Selecting Which Facilitators to Call

Defense counsel should not call every facilitator who worked with the respondent. The goal is to present the most compelling, coherent picture of the respondent's current dynamic risk profile based on the people who actually observed him in treatment. The selection process should be guided by the investigator's interviews:

- **Prioritize Facilitators with Extensive Direct Contact:** A facilitator who ran weekly groups with the respondent for two or more years has far more meaningful observational data than one who facilitated a single workshop. Longevity of observation gives the facilitator's testimony greater weight.

- **Prioritize Facilitators Who Can Address Specific Stable-2007 Factors:** If the evaluator has scored the respondent high on Impulsivity, Sex as Coping, or Hostility Toward Women on the Stable-2007, look for facilitators from groups that directly address those areas — groups on impulse regulation, healthy sexuality, or relationship skills. A facilitator who ran a group specifically addressing the factor the evaluator claims is still high concern is ideally positioned to contradict that scoring.
- **Avoid Facilitators Who Have Mixed or Ambivalent Views:** A facilitator who says 'he's making progress but I still have concerns' is not a useful defense witness. The jury will hear the 'concerns' part and discount the 'progress' part. Only call facilitators who can give clear, credible, favorable testimony about the respondent's current functioning.
- **Consider the Facilitator's Personal Style and Credibility:** Some facilitators are natural communicators who will come across well on the stand. Others are more technical or guarded. The investigator should assess not just what the facilitator says but how the facilitator says it — whether the person projects credibility, warmth, and professional confidence.

E. Preparing and Presenting the Treatment Evidence at Trial

The treatment evidence — PSR Notes and facilitator testimony — should be presented as part of a coherent defense narrative that addresses the evaluators' specific risk factor findings. Rather than simply introducing favorable records and hoping the jury understands their significance, defense counsel should structure the presentation so that the jury can compare what the evaluators claimed in their reports against what the facilitators observed in actual treatment.

The Three-Layer Defense Presentation

> **STEP 1 — ATTACK THE EVALUATORS' DYNAMIC RISK FINDINGS:** On cross-examination, expose the evaluators' failure to review or adequately weigh the PSR Notes and the treatment records. Ask: 'Did you review the monthly PSR Notes from [group names]?' 'Did you speak with [facilitator names] about their direct observations of [Respondent] in group?' 'If the facilitators who have observed [Respondent] weekly for [X] years do not document the concerning behaviors you reference, how do you reconcile that with your assessment?'

> **STEP 2 — PRESENT THE PSR NOTES AS DOCUMENTARY EVIDENCE:** Introduce the PSR Notes into evidence as business records of Coalinga State Hospital under Evidence Code Section 1271. Highlight the specific entries that document the respondent's engagement, skill development, and absence of the behaviors the evaluators claim are still present at high concern levels. Have defense counsel walk the jury through the most significant entries — do not simply dump a binder of records on the jury.

> **STEP 3 — CALL THE FACILITATOR WITNESSES:** Present the facilitator witnesses after the PSR Notes are in evidence, so the facilitators can explain and elaborate on what the records show. Structure the direct examination to have the facilitator: (a) describe the specific group they ran; (b) describe how long they worked directly with the respondent; (c) describe the observations documented in the PSR Notes; (d) describe the treatment gains they personally observed; and (e) address specifically whether they observed the behaviors the evaluators cited as risk factors.

F. The Defense Expert at Trial

The same considerations that apply to retaining a defense expert for the PCH apply at trial. A retained defense expert who can review the evaluators' methodology, critique their specific findings, and offer a competing clinical opinion on the respondent's current risk level is a powerful asset. At trial, unlike at the PCH, the defense expert has the full treatment record — including PSR Notes and the history of the respondent's treatment progress — to incorporate into the opinion.

The defense expert at trial should be prepared to do the following:

- **Review and Address the PSR Notes:** The defense expert should review the entire PSR Note record and opine on what the treatment observations documented in those records indicate about the respondent's current dynamic risk profile, including specifically addressing the Stable-2007 dynamic factors.
- **Critique the Evaluators' Failure to Weigh Treatment Evidence:** If the state's evaluators based their current opinions primarily on historical offense data and prior evaluations without adequately engaging with the current treatment record, the defense expert should address this methodological failure specifically.
- **Offer an Alternative Risk Formulation:** Based on the complete record — historical data, current testing, and current treatment observations — the defense

expert should offer a current risk opinion that takes into account the treatment progress and provides the jury with an alternative to the evaluators' opinions.

G. Jury Selection in SVP Commitment Trials

SVP commitment trials are tried before a jury, and jury selection is among the most important phases of the trial. The subject matter — sexual offenses against victims, mental health diagnosis, risk assessment — presents unique challenges for jury selection that require specific attention.

- **Explore Bias Regarding Mental Health Treatment:** Some jurors believe that mental health treatment for sex offenders is either ineffective or inappropriate. These jurors may be predisposed to find that the respondent cannot be treated or rehabilitated, regardless of evidence of treatment progress. Jurors who cannot credit treatment evidence as meaningful should be challenged for cause or excused through peremptory challenges.
- **Explore Attitude Toward the Burden of Proof:** The prosecution bears the burden of proving beyond a reasonable doubt that the respondent meets the SVP criteria. This is the same standard as in a criminal trial. Some jurors — particularly in cases involving alleged sex offenders — will apply a lower standard than reasonable doubt. Explore this in voir dire: 'If the prosecution cannot prove beyond a reasonable doubt that [Respondent] is currently likely to commit a sexually violent offense due to a mental disorder, would you be able to return a verdict in his favor?' Jurors who answer that question equivocally should be scrutinized carefully.
- **Address the Distinction Between Past Offenses and Current Risk:** Many jurors will assume that because the respondent committed sexual offenses in the past, he will do so again. The law requires proof of current risk — current diagnosis, current likelihood of reoffense. Jurors who cannot make the distinction between past conduct and current risk should be excused.
- **Explore Experience with the Mental Health System:** Jurors with personal or family experience in the mental health system — particularly with treatment at institutions — may bring pre-existing views about the effectiveness or ineffectiveness of treatment that bear on how they assess the defense evidence.

H. Closing Argument in an SVP Commitment Trial

Closing argument in an SVP trial should synthesize the entire defense case into a coherent narrative that returns to the core legal question: Has the prosecution proven

beyond a reasonable doubt that this individual, today, has a diagnosed mental disorder that makes it likely he will engage in sexually violent criminal behavior?

The closing should address each of the four elements the prosecution must prove (*Walker v. Superior Court* (2021) 12 Cal.5th 177): (1) prior qualifying conviction; (2) current diagnosed mental disorder; (3) likelihood of future sexually violent acts as a result of the disorder; and (4) predatory nature of the anticipated acts. If any element fails — particularly elements (2) and (3), which require current findings — the prosecution has not met its burden.

Effective closing argument in an SVP case will specifically contrast what the evaluators claimed in their reports with what the treatment record and the facilitators' testimony actually showed about the respondent's current functioning. The jury should leave closing argument understanding that the respondent is not the same person who committed the predicate offenses — that treatment has been occurring, that progress has been documented by people who worked with him directly every week, and that the prosecution's experts formed their opinions without adequately accounting for that evidence.

● **KEY POINT:** The central defense theme in an SVP commitment trial, when a treatment record exists, is this: The evaluators looked backward. The treatment record looks at who this person is today. The law requires proof of current risk. You cannot prove current risk with historical data alone — and the people who actually worked with this individual in treatment, week after week, do not support the evaluators' conclusions about his current dangerousness.

I. Should Your Client Testify At Trial

The decision whether to place a client on the witness stand at an SVP commitment trial is one of the most consequential strategic choices an attorney can make. It is rarely the right choice, and when it is made, the attorney must understand with precision exactly what testimony will be elicited, what subject matter that testimony touches, and what the California Evidence Code permits the prosecution to do in response. A poorly planned decision to have the client testify — or a failure to control the scope of direct examination — can introduce more damaging material into the record than if the client had never testified at all. This guide lays out the legal framework, the limited circumstances in which client testimony can be beneficial, and the procedural tools available when the prosecution exceeds the scope of what direct examination permits.

I. The Threshold Question: When Client Testimony Is Worth Considering

In the vast majority of SVP cases, the client should not testify. The client's criminal history — the predicate qualifying offenses — is already in evidence. The diagnosis and risk assessment are presented through the state's evaluators. The client's prior statements, institutional records, and conduct history are before the jury through expert witnesses and exhibits. Placing the client on the stand adds one thing the jury does not otherwise have: live observation of the client answering questions. That benefit is rarely worth the risk.

The calculus changes in one specific, limited circumstance: when the client has genuinely engaged in and progressed through treatment at Coalinga State Hospital, and when the attorney believes that having the client explain that treatment experience — in his own words, calmly and credibly — will meaningfully reinforce the defense expert's testimony about treatment progress, reduction of Dynamic Risk Factors, and reduced risk of reoffense. Even then, the testimony should be narrow, controlled, and thoroughly rehearsed.

THE ONLY REASON TO CONSIDER CLIENT TESTIMONY

Client testimony at an SVP trial should only be considered when the client has meaningfully participated in or completed treatment programming, and the attorney has determined that the client can credibly and calmly describe that treatment experience to the jury. No other purpose justifies the risk.

a. What the Client Can Offer: The Treatment Narrative

A client who has worked through SOTP modules — completing workbooks, attending groups consistently, engaging with facilitators, and developing insight into the cognitive distortions and Dynamic Risk Factors that the prosecution's evaluators will identify — has something valuable to say. That client can explain to the jury, in concrete and specific terms:

- Which treatment modules he has completed and what each module addressed;
- The specific groups he has attended, the frequency of attendance, and the nature of his participation;
- What he has learned about his own cognitive patterns, emotional triggers, or risk factors;
- How his understanding of his own behavior has changed through treatment;
- What relapse prevention strategies he has developed and how he would apply them in the community.

This testimony, if delivered clearly and credibly, can humanize the client for the jury and can provide concrete, specific support for the defense expert's clinical conclusions about treatment progress and reduced current risk. It can rebut an evaluator's characterization of the client as unengaged or without insight. And it can demonstrate exactly the kind of volitional change that *Kansas v. Crane* (2002) 534 U.S. 407 requires for the court to find that the mental disorder no longer creates serious difficulty controlling behavior.

b. What the Client Must Not Be Asked About on Direct

If the attorney decides the client will testify, the scope of direct examination must be strictly limited to treatment and treatment-related topics. The attorney must not ask about — and the client must understand not to volunteer information about:

- The facts of the qualifying offenses or prior convictions;
- Other criminal history or arrests;
- Prior treatment records from outside Coalinga or from earlier commitments;
- Relationships with other patients or incidents on the unit unrelated to treatment;
- The client's mental health history outside of what is directly relevant to current treatment;
- Opinions about the fairness of the SVPA or the proceedings.

The reason this boundary is so critical is not merely strategic — it is legal. Under California law, the scope of cross-examination is directly determined by the scope of direct examination. By asking only about treatment, the attorney draws a legal line that the prosecution may not cross without triggering a valid objection.

II. The Evidentiary Framework: Direct Examination and Cross-Examination Under California Law

California's rules governing the permissible scope of cross-examination are clear and well-established. They are codified in the California Evidence Code and have been consistently applied in SVP proceedings.

a. California Evidence Code Section 773 — Scope of Cross-Examination

The foundational rule is set out in California Evidence Code section 773:

> *Evidence Code § 773(a): "A witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by another party."*
>
> *Evidence Code § 773(b): "The cross-examination of a witness by any party whose interest is not adverse to the party calling the witness is subject to the same rules that are applicable to direct examination."*

Section 773(a) is the controlling provision in SVP trial practice. It establishes the outer boundary of permissible cross-examination: the prosecution may question the defendant only about matters that were addressed, opened, or touched upon during direct examination. If direct examination covers only treatment — the groups attended, the skills developed, the insight gained — then section 773(a) limits cross-examination to the same terrain.

b. California Evidence Code Section 761 — Direct Examination Defined

Evidence Code section 761 defines direct examination as the first examination of a witness by the party who called the witness. The scope of subsequent cross-examination is measured against this first examination. Once the attorney concludes direct examination, the record of what was asked and answered defines what the prosecution may explore in response.

> *Evidence Code § 761: "Direct examination is the first examination of a witness by the party who called the witness."*

c. California Evidence Code Section 760 — Examination Defined

Evidence Code section 760 defines examination as the questioning of a witness under oath. All examination of the defendant-as-witness is subject to the Evidence Code's rules, and the court must enforce those rules on objection.

d. The Practical Effect: Direct Examination Determines the Cross-Examination Perimeter

Together, sections 761 and 773 establish a critical principle: the attorney controls the scope of cross-examination by controlling the scope of direct examination. If the attorney asks only about treatment, the prosecution's cross-examination perimeter is drawn around treatment. The prosecution may probe that testimony — challenging the depth of understanding, questioning whether the client truly internalized the material, testing whether the stated insight is genuine — but it may not venture into subjects the direct examination did not reach.

KEY LEGAL PRINCIPLE: YOU CONTROL THE PERIMETER

Direct examination by defense counsel determines what subjects are 'within the scope' of cross-examination under Evidence Code § 773(a).

If direct examination is limited exclusively to treatment participation and progress, the prosecution's cross-examination is confined to those same topics.

Criminal history, prior bad acts, institutional misconduct, and other damaging subjects are outside the scope of cross-examination if they were not mentioned during direct examination.

III. When the Prosecution Exceeds the Scope: The Objection and What Follows

Even when direct examination is properly limited to treatment, the prosecution will sometimes attempt to cross-examine on matters outside that scope. The attorney must be prepared to recognize when this happens and to act immediately.

a. The Objection: 'Beyond the Scope of Direct Examination'

When the prosecutor asks a question that goes into subject matter not addressed during direct examination, defense counsel must promptly object. The correct objection is:

"Objection, Your Honor. Beyond the scope of direct examination.
Direct examination was limited to the client's treatment participation and progress.
This question goes into [criminal history / subject matter not raised on direct]."

This objection is grounded in Evidence Code section 773(a). It is well-recognized, and a properly trained trial court should sustain it. If the court asks for the legal basis, the attorney should cite section 773 and, if relevant, the court's own pretrial rulings on the scope of the client's testimony.

B. Two Possible Rulings — and What Each Requires of Counsel

When the objection is made, the trial court will either sustain or overrule it.

IF THE COURT SUSTAINS THE OBJECTION

The prosecution's question is disallowed. The record reflects that the question was outside the scope of direct examination.

Counsel should note the objection was sustained for the record and move forward.

If the prosecutor continues to push into out-of-scope territory, renew the objection each time and consider requesting a sidebar to address the pattern with the court.

IF THE COURT OVERRULES THE OBJECTION

This is the decision point. The court's ruling does not make the prosecution's question proper — it means the court has made an error of law that is preserved for appeal. But counsel must now act quickly.

Do not allow the client to answer the question yet.

The attorney must immediately assess whether allowing the cross-examination to proceed on this new subject matter will be damaging to the client's case.

If the answer is yes — or even likely yes — the attorney must be prepared to make a motion to strike the client's entire testimony.

IV. The Motion to Strike the Client's Testimony

If the court overrules the beyond-the-scope objection and the attorney determines that proceeding with cross-examination on the newly opened subject matter would be damaging, the correct move is to move to strike the client's entire testimony and to request a curative instruction that the jury disregard it.

a. The Strategic Calculus

The moment the court overrules the objection to out-of-scope cross-examination, the attorney faces a rapid decision:

- Can the client handle the cross-examination without suffering significant damage? Is the prosecution's line of questioning one the client can navigate credibly and without opening further damaging doors?

- If the prosecution is heading toward criminal history, prior sexual misconduct, or other highly prejudicial areas, the damage from that cross-examination will almost certainly exceed any benefit the direct examination provided.
- If the damage from cross-examination outweighs the benefit of the treatment testimony on direct, the testimony should not stand. It is better to have no testimony than damaging testimony in the record.

This calculus must be made quickly. The attorney should request a brief sidebar or, if possible, a short recess to confer with the client before the cross-examination proceeds on the new subject. Even a few minutes to assess the situation is valuable.

b. The Motion to Strike — What to Say

The motion to strike the client's entire testimony should be made on the record, on the following grounds:

1. The court has overruled defense counsel's objection and permitted cross-examination on subject matter that was not addressed during direct examination, contrary to Evidence Code section 773(a).
2. The out-of-scope cross-examination has, or will, introduce highly prejudicial material into the record that would not have been before the jury but for the court's erroneous ruling.
3. Because the cross-examination cannot be cleanly severed from the direct examination, the proper remedy is to strike the client's entire testimony and to instruct the jury to disregard it.
4. Permitting the testimony to stand — with out-of-scope cross-examination that the defense cannot fairly address without further widening the scope — would be fundamentally unfair and would deprive the client of a fair trial.

SAMPLE MOTION LANGUAGE — ON THE RECORD

"Your Honor, I move to strike Mr. [client]'s entire testimony. The Court has overruled my objection to cross-examination that goes well beyond the subject matter of direct examination, which was limited to the client's treatment participation and progress at Coalinga State Hospital. The prosecution is now asking about [criminal history / other out-of-scope matter], which was deliberately not addressed on direct examination. The jury should not have access to this testimony — neither the direct nor the cross — because to allow the direct without allowing fair cross-examination would be equally unfair. The appropriate remedy is to strike all of the client's testimony and to instruct the jury to disregard it entirely. I am also preserving this ruling for appeal.

> We ask the Court to give the jury a curative instruction that all testimony by Mr. [client] is stricken and must not be considered for any purpose."

c. The Curative Instruction

If the court grants the motion to strike, defense counsel should request a curative instruction to the jury. The instruction should direct the jury that:

- The testimony of [client name] has been stricken from the record.
- The jury must not consider any of that testimony for any purpose.
- The jury must not speculate as to the content or meaning of the stricken testimony.

The curative instruction is important not just for its practical effect — jurors do not always follow such instructions perfectly — but for the appellate record. A jury instruction to disregard stricken testimony is standard California procedure, supported by Evidence Code section 353 and the court's inherent authority to correct prejudicial errors.

d. Preserving the Error for Appeal

Whether the court grants or denies the motion to strike, the attorney has at this point created a preserved appellate issue. The preservation requires:

- A timely and specific objection at the moment of the out-of-scope question (Evidence Code § 353 — timely and specific objection required to preserve error for appeal);
- A statement on the record of the specific legal basis — Evidence Code § 773(a), beyond the scope of direct examination;
- A motion to strike, made on the record, with specific grounds;
- If the motion is denied, a request for a curative instruction, made on the record;
- A clear statement that counsel is preserving the ruling for appeal.

These steps, taken together, give appellate counsel the tools to argue that the trial court's erroneous ruling — permitting out-of-scope cross-examination over a proper objection — was prejudicial error requiring reversal or a new trial. A judgment entered after an SVP trial can be appealed, and the precise preservation of this type of evidentiary error is the foundation of a viable appellate claim.

V. The Full Decision Framework: Step by Step

The following step-by-step framework consolidates everything above into a practical decision guide for trial counsel.

STEP 1: PRE-TRIAL DETERMINATION — SHOULD THE CLIENT TESTIFY AT ALL?

- Has the client genuinely participated in and progressed through treatment at Coalinga (SOTP module participation, group attendance, workbook completion, facilitator assessments)?
- Can the client speak clearly, calmly, and credibly about what he learned in treatment — without becoming emotional, defensive, or inconsistent?
- Is the defense expert's treatment-progress testimony insufficient on its own — does the client's personal voice add something the expert cannot provide?
- Have you thoroughly prepared and rehearsed the direct examination with the client, including explicit instruction never to volunteer information outside the treatment narrative?
- If the answer to all of the above is yes: consider limited testimony on treatment only. If any answer is no: do not put the client on the stand.

STEP 2: PREPARE A TREATMENT-ONLY DIRECT EXAMINATION

- Draft every direct examination question in writing before trial. Every question must be about treatment and nothing else.
- Test each question: does it touch criminal history, prior offenses, institutional misconduct, or any other subject matter outside treatment? If yes, delete the question.
- Prepare the client thoroughly: he must understand that on direct examination he is to answer only what is asked, not volunteer additional information, and stop speaking when you stop asking.
- Conduct a full mock direct examination and anticipate every follow-up answer the client might give that could open new doors.

STEP 3: MONITOR CROSS-EXAMINATION IN REAL TIME

- Listen to every prosecution question for subject matter that was not addressed during direct examination.
- The moment a question ventures outside treatment — including any question about

criminal history, prior offenses, or other out-of-scope matters — stand and object: 'Objection, Your Honor. Beyond the scope of direct examination.'
- Cite Evidence Code section 773(a) if the court asks for the basis.
- Do not allow the client to answer an out-of-scope question before the court rules on the objection.

STEP 4: IF OBJECTION IS OVERRULED — IMMEDIATE ASSESSMENT

- Request a brief recess or sidebar to assess the situation before the prosecution continues.
- Ask yourself: if this cross-examination proceeds on [criminal history / the out-of-scope subject], will the damage to the case outweigh the benefit of the treatment testimony already given on direct?
- If the answer is yes — even if you are unsure — move to strike.
- Do not allow the cross-examination to proceed further while you are making this assessment.

STEP 5: IF MOTION TO STRIKE IS WARRANTED — ACT IMMEDIATELY

- Make the motion to strike on the record, citing the out-of-scope ruling, the prejudice from the new material, and the inability to fairly address the cross-examination without widening scope further.
- Request a curative instruction if the motion is granted.
- Whether granted or denied, expressly state on the record that you are preserving the ruling for appeal.
- If the motion is denied and the cross-examination continues into damaging territory, continue to object to each individual question to preserve each specific error.
- After trial, evaluate the impact of the ruling on the verdict for purposes of a motion for new trial or appeal.

VI. Statutes and Case Law Reference

California Evidence Code — Key Provisions

> *Evidence Code § 761: "Direct examination is the first examination of a witness by the party who called the witness."*
>
> *Evidence Code § 773(a): "A witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by another party."*
>
> *Evidence Code § 773(b): "The cross-examination of a witness by any party whose interest is not adverse to the party calling the witness is subject to the same rules that are applicable to direct examination."*
>
> *Evidence Code § 353: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion..."*
>
> *Evidence Code § 354: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means..."*

Applied Principles in SVP Trial Practice

- The scope of cross-examination is governed by Evidence Code § 773(a). A cross-examination question is permissible only if it concerns subject matter within the scope of the direct examination. This rule applies equally in SVP commitment trials, which are civil proceedings to which the Evidence Code applies in full. (See Welf. & Inst. Code, § 6603; Evid. Code, § 300.)
- In *People v. Field* (2024) 106 Cal.App.5th 132, the Court of Appeal addressed the compelled testimony of SVPs at their commitment trials in the context of equal protection. The court recognized the significance of testimony control in SVP proceedings. Defense counsel must be prepared to limit and if necessary strike client testimony that has been rendered unfair by judicial error in managing cross-examination scope.

- *Kansas v. Crane* (2002) 534 U.S. 407 establishes that SVP commitment requires proof of serious difficulty controlling sexually violent behavior. Treatment testimony that demonstrates behavioral change and developing volitional control is the most powerful evidence available to the defense. This is the one legitimate purpose for client testimony — and it must be protected from out-of-scope prosecution interference.
- California Evidence Code section 353 requires a timely and specific objection to preserve evidentiary error for appeal. The specific ground 'beyond the scope of direct examination under Evidence Code section 773' must be stated on the record at the time of the objection. A general objection without grounds does not preserve the issue for appeal.

SECTION 6: TAKING OVER AN SVP CASE

Among the most demanding situations defense counsel can face is being assigned to an SVP case that has already passed through the probable cause stage and is being set for trial — one that was handled by a predecessor attorney. Taking over such a case is not simply a matter of picking up where the prior attorney left off. It requires a systematic, critical assessment of everything the prior attorney did and failed to do, a candid evaluation of whether the respondent's constitutional rights were protected, and immediate action if they were not. This section addresses the two primary legal remedies available when an incoming attorney discovers deficiencies in prior representation or a prolonged denial of the right to a timely trial: a Petition for Writ of Habeas Corpus based on ineffective assistance of counsel, and a Petition for Writ of Habeas Corpus based on denial of the constitutional right to a speedy trial.

A. The First Task: Review the Probable Cause Hearing Record

The incoming attorney's first obligation is to obtain and carefully review the complete record from the probable cause hearing (PCH), including the reporter's transcript of all proceedings. This is not a formality — it is a substantive legal audit of the prior attorney's performance. The outcome of this review will determine whether the incoming attorney can simply take over and prepare for trial, or must first take remedial action to protect the respondent's rights.

The review must be systematic and cover each of the following areas. For each area, the incoming attorney must determine not only whether the prior attorney took the required steps, but whether those steps were executed competently — a technically present but substantively inadequate effort may still constitute deficient performance under *Strickland v. Washington* (1984) 466 U.S. 668.

PCH Audit Checklist

☐ **Defense Evaluator:** Did the prior attorney retain a qualified independent defense evaluator and present that evaluator's testimony at the PCH? The defense evaluator is not optional in SVP proceedings — it is the mechanism by which the evaluators' methodology, diagnoses, and risk instrument scores are subjected to adversarial testing. An attorney who fails to hire a defense evaluator, or who hires one but does not present the evaluator's testimony, has stripped the respondent of his most important defensive tool. Review the PCH transcript: Was a defense evaluator called? Did the evaluator address the specific diagnoses, the volitional impairment theory, the Static-99R score, and the Stable-2007 scoring? If not — this is a critical deficiency.

☐ **Motion in Limine:** Did the prior attorney file a motion in limine to exclude inadmissible evidence? As detailed in Section 2 of this handbook, motions in limine in SVP proceedings are essential to limit the hearsay that evaluators can relay to the trier of fact, to challenge the admissibility of evidence underlying the evaluators' opinions, and to preserve the record for appellate review. Review the record: Was a motion in limine filed and argued? What was excluded? What was not challenged that should have been? A failure to file any motion in limine — or a motion that failed to address the central evidentiary issues — is a deficiency that warrants scrutiny.

☐ **Challenge to Mental Diagnosis:** Did the prior attorney meaningfully challenge the evaluators' mental disorder diagnoses? As addressed in Section 3 of this handbook, the diagnosis is the legal and clinical foundation of any SVP commitment. If the evaluator diagnosed pedophilic disorder without distinguishing prepubescent from pubescent attraction, or relied on conviction-based inference alone to establish a paraphilic diagnosis, the prior attorney should have challenged that methodology with cross-examination and retained defense expert testimony. Review the PCH transcript: Were the evaluators cross-examined on their diagnostic methodology? Was any defense evidence presented on the DSM-5 criteria and the limits of conviction-based diagnosis?

☐ **Challenge to Volitional Impairment:** Did the prior attorney challenge the evaluators' volitional impairment opinions? Under *Kansas v. Crane* (2002) 534 U.S. 407, proof of serious difficulty in controlling behavior is constitutionally required in SVP proceedings. As addressed in Section 3, evaluators routinely conflate the diagnosis with the impairment finding, using the same offense history to prove both. The prior attorney should have cross-examined the evaluators on the circular reasoning problem, the absence of neurocognitive testing, and the published

research establishing that paraphilic diagnoses do not automatically establish volitional impairment. Review the transcript: Was volitional impairment specifically challenged?

☐ **Challenge to Stable-2007 Scoring:** Did the prior attorney challenge the evaluators' Stable-2007 dynamic risk factor scoring? As addressed in Section 3, the Stable-2007 is a tool designed to assess current, dynamic risk factors based on current behavioral evidence — not historical offense records. If evaluators scored items based on offense history rather than current clinical assessment, the prior attorney should have cross-examined them on this substitution and presented defense expert testimony. Review the transcript: Were specific Stable-2007 items challenged? Were evaluators asked what current evidence supported each elevated score?

☐ **Challenge to Static-99R Score:** Did the prior attorney challenge the Static-99R score? As addressed in Section 3, the Static-99R has documented limitations in the SVP population, including overprediction of recidivism, norm selection problems, and AUC values barely above chance in the California SVP population. Three of the ten items score non-sexual offenses, which is structurally inconsistent with the SVP inquiry. Review the transcript: Were the Static-99R's limitations addressed in cross-examination or through defense expert testimony?

⚠ **Critical Standard:** The standard for deficient performance under *Strickland v. Washington* (1984) 466 U.S. 668 is whether counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. In SVP proceedings, the above checklist items represent the minimum competent defense. An attorney who failed to retain a defense evaluator, failed to challenge the diagnoses and risk instrument scores, and failed to file motions in limine has almost certainly provided deficient performance. The more demanding question is prejudice: whether there is a reasonable probability that the outcome would have been different had counsel performed competently.

B. The Conflict Problem: When the Prior Attorney Is from the Same Office

A critical threshold issue arises whenever the incoming attorney is assigned from the same public defender's office — or the same legal organization — as the attorney who

handled the PCH. This situation creates an actual or potential conflict of interest that must be addressed before any remedial action can be taken.

The reality of institutional legal practice is well-understood: an attorney will not, in the ordinary course of events, file a petition for writ of habeas corpus alleging ineffective assistance of counsel if the attorney who provided the allegedly deficient performance is a colleague from the same office. The institutional loyalty, the professional relationships, and the practical dynamics of a shared workplace make it nearly impossible for an attorney in this position to provide the respondent with truly independent, objective representation on an IAC claim.

This is not a matter of individual bad faith — it is a structural conflict that the legal system recognizes and addresses. When a conflict of interest prevents an attorney from fully and independently representing a client, the attorney has an obligation to take action to protect the client's rights.

Steps the Incoming Attorney Must Take

1. **Recognize the Conflict Immediately:** As soon as the incoming attorney identifies that the prior attorney's PCH performance may constitute ineffective assistance of counsel, and as soon as the incoming attorney recognizes that the prior attorney is from the same office, the conflict becomes actual — not potential. The incoming attorney cannot proceed to represent the respondent on matters where the respondent's interests conflict with the institutional interests of the attorney's office.
1. **Declare a Conflict and Seek Disqualification:** The incoming attorney must move to declare a conflict and seek disqualification of the entire office from further representation of this respondent on any IAC-related claims. The court must be informed of the conflict. A motion for new counsel — a Marsden-type motion in the SVP context — should be filed promptly, explaining that the conflict arises from the prior attorney's performance and the incoming attorney's inability to independently evaluate or pursue an IAC claim against a colleague.
2. **Seek Appointment of Independent Counsel:** The court must appoint independent counsel — an attorney with no connection to the prior public defender's office — to represent the respondent's interests in evaluating and, if warranted, pursuing the IAC-based habeas petition. This may be panel attorney or special-circumstance counsel. Until independent counsel is in place, the respondent's IAC claim cannot be pursued by anyone currently within the conflicted office.

3. **Protect the Record:** Before departing the case, the incoming attorney from the conflicted office should ensure that the record is preserved — that all transcripts, reports, and documents are available for independent counsel. The incoming attorney should not take any action that would prejudice the respondent's ability to pursue the IAC claim.

✔ **PRACTICE NOTE:** The conflict disqualification must happen before the incoming attorney takes any substantive position on the merits of the IAC claim. An attorney who remains in the case, reviews the IAC issues, and then declares a conflict after forming a view has compromised the respondent's rights further. Declare the conflict as soon as it is recognized, before any substantive IAC analysis is attempted by counsel from the conflicted office.

C. Habeas Corpus Petition Based on Ineffective Assistance of Counsel

If the PCH audit reveals that the prior attorney failed to provide constitutionally adequate representation, and independent counsel is in place, the vehicle for relief is a Petition for Writ of Habeas Corpus. In the SVP context, the authority for habeas corpus as the appropriate remedy for PCH errors is established by *People v. Talhelm* (2000) 85 Cal.App.4th 400.

People v. Talhelm — (2000) 85 Cal.App.4th 400

> The Court of Appeal held that a petition for writ of habeas corpus is the appropriate vehicle to challenge a probable cause finding under the SVP Act, noting that Penal Code § 1473(a) — which authorizes habeas relief for any person 'unlawfully imprisoned or restrained in his liberty, under any pretense whatever' — is sufficiently broad to encompass SVP commitment proceedings. The *Talhelm* court observed that dictum from several then-recent cases strongly suggested habeas corpus as the proper vehicle for challenging PCH findings, including for IAC claims arising from the PCH itself.

The IAC-based habeas petition in an SVP case must establish both prongs of the Strickland standard: deficient performance and prejudice.

Prong One: Deficient Performance

Deficient performance means counsel's conduct fell below an objective standard of reasonableness. The petitioner must identify specific acts or omissions — not general dissatisfaction with the outcome — and show that no competent attorney would have made the same choices. For each PCH audit checklist item above where the prior attorney failed, the habeas petition must articulate specifically: what was not done, what a competent SVP defense attorney would have done, and why the omission was not the product of any reasonable tactical decision.

To support this showing, the habeas petition should include:

- **Declaration of Prior Counsel (if obtainable):** Contact the prior attorney and request an explanation for the challenged omissions. If prior counsel cannot articulate a strategic rationale for failing to hire a defense evaluator, file motions in limine, or challenge the diagnoses and risk instruments, that absence of tactical explanation strengthens the deficiency showing.
- **Declaration of a Competent SVP Defense Attorney:** Obtain a declaration from an experienced SVP defense attorney — not a general criminal defense attorney — attesting that the failures identified constitute departures from the prevailing professional norms in SVP defense practice.
- **PCH Transcript Excerpts:** Include the relevant portions of the PCH transcript that demonstrate the absence of the required defensive steps. If no defense evaluator testified, the transcript will show only the evaluators' uncontested opinions. If no cross-examination on volitional impairment was conducted, the transcript will confirm the omission.
- **Expert Declarations on What Defense Should Have Shown:** Retain the retained defense expert who should have been retained originally. Have the expert prepare a declaration explaining what the expert would have testified to at the PCH — what opinions, critiques, and challenges — and why that testimony was material to the outcome.

Prong Two: Prejudice

Prejudice requires showing a reasonable probability that, but for counsel's deficient performance, the outcome of the PCH would have been different — specifically, that probable cause would not have been found. In the SVP PCH context, this is a showing that the evidence supporting probable cause was not overwhelming, and that competent cross-examination and defense expert testimony could have created reasonable doubt about one or more of the required findings: the qualifying prior conviction, the current diagnosed mental disorder, and the likely future sexually violent acts.

The prejudice showing is strongest where:

- **The Diagnosis Was Methodologically Vulnerable:** If the evaluators relied primarily on conviction-based inference to establish the paraphilic diagnosis, a defense expert's critique of that methodology — combined with objective testing data that does not support the diagnosis — creates a substantial likelihood that probable cause would not have been found with competent defense presentation.
- **The Volitional Impairment Opinion Lacked Independent Support:** If the evaluators' volitional impairment opinion was based on nothing more than the offense history — the classic circular reasoning problem identified in Section 3 — there is a reasonable probability that a properly cross-examined evaluator would have been forced to concede the weakness of that foundation.
- **Risk Scores Were Inflated by Improper Scoring:** If the Stable-2007 items were scored based on historical offense data rather than current behavioral evidence, and if the Static-99R score was inflated by non-sexual offense items, the defense expert could have demonstrated that the actual empirical risk profile was materially lower than the evaluators represented.

D. Habeas Corpus Petition Based on Denial of the Right to a Timely Trial

The second major category of habeas relief available to an incoming attorney reviewing an SVP case is relief based on the denial of the respondent's due process right to a timely trial. When a respondent has been detained at Coalinga State Hospital or another secure facility for years — or more than a decade — awaiting trial on an SVP petition, and that delay was not the result of the respondent's own strategic choices, the constitutional violation may be actionable through habeas corpus.

This is both a powerful remedy and a highly fact-specific one. The incoming attorney must review the complete procedural history of the case with the same systematic care applied to the PCH audit, this time focused on the length of the delay, who caused it, and whether the respondent ever expressed a desire for a timely trial. The case law governing this area is extensive and must be thoroughly understood.

E. The Governing Legal Framework: Cases Incoming Counsel Must Know

The following cases establish the constitutional and analytical framework for speedy trial habeas claims in SVP proceedings. Incoming counsel must be fully conversant with each before filing a habeas petition on speedy trial grounds.

Barker v. Wingo — (1972) 407 U.S. 514

The foundational United States Supreme Court decision establishing the four-factor balancing test for speedy trial claims: (1) length of the delay; (2) reason for the delay (government culpability vs. defense attribution); (3) whether the defendant asserted the speedy trial right; and (4) prejudice to the defendant. No single factor is determinative; courts conduct a fact-intensive balancing of all four. A delay that is presumptively prejudicial triggers a full *Barker* analysis. *Barker* remains the baseline analytical framework applied in SVP speedy trial cases in California.

Doggett v. United States — (1992) 505 U.S. 647

The Supreme Court extended *Barker's* prejudice analysis, holding that when the government is the primary cause of delay and the delay is sufficiently lengthy, prejudice may be presumed — the defendant need not demonstrate specific, concrete harm. In *Doggett*, an eight-and-a-half year delay was found presumptively prejudicial in the speedy trial context. This case is important in SVP proceedings where delays of ten or more years are not uncommon and the respondent may have difficulty demonstrating specific prejudice from the passage of time.

Mathews v. Eldridge — (1976) 424 U.S. 319

The Supreme Court's procedural due process balancing test: weigh (1) the private interest affected; (2) the risk of erroneous deprivation through the existing procedures and the probable value of additional procedural safeguards; and (3) the government's interest, including the burden of additional procedures. In SVP proceedings, the private interest — indefinite civil commitment — is among the most substantial deprivations of liberty the civil law imposes. Several California courts have applied the *Mathews* framework alongside *Barker* when evaluating SVP pretrial delay claims.

People v. Litmon — (2008) 162 Cal.App.4th 383

One of the most important SVP-specific speedy trial decisions. *Litmon* established that alleged SVPs detained prior to trial have a due process right to a timely trial — the right is triggered by deprivation of liberty, not by the criminal conviction that gave rise to the petition. *Litmon* applied both the *Barker* and *Mathews* frameworks and held that 'post-deprivation, pretrial delays in SVP proceedings cannot be routinely excused by systemic problems, such as understaffed public prosecutor or public defender offices facing

heavy caseloads, underdeveloped expert witness pools, or insufficient judges or facilities to handle overcrowded trial dockets.' The ultimate responsibility for bringing the alleged SVP to trial rests with the government. Critically, *Litmon* held that a delay of one year in SVP proceedings creates a presumption of prejudice that triggers the *Barker* balancing test.

People v. Superior Court (Vasquez) — (2018) 27 Cal.App.5th 36

A landmark case establishing the critical 'Hobson's Choice' doctrine in SVP proceedings. The Court of Appeal upheld the dismissal of a 17-year delayed SVP petition, finding the delay resulted from a 'systemic breakdown in the public defender system' attributable to the state — specifically, dramatic staffing cuts in the Los Angeles County Public Defender's SVP unit. The Court expressly held that Vasquez was forced to choose between having prepared counsel and a timely trial — and that under the Constitution he was entitled to both. This is the definitive California authority for the proposition that systemic public defender failures are attributable to the state, not the respondent, for speedy trial purposes. The remedy for unconstitutional delay in an SVP case is dismissal of the petition with prejudice.

People v. Williams — (2013) 58 Cal.4th 197

The California Supreme Court applied *Barker* to a lengthy pretrial delay in trial proceeding, analyzing the interplay between the right to a speedy trial and the right to competent counsel. *Williams* holds that the trial court has an affirmative constitutional obligation to bring cases to trial in a timely manner and must set deadlines and hold parties strictly to them unless good cause is shown. The Court stated that 'when a defense attorney requests more time to prepare for trial, the trial court must balance a defendant's right to a speedy trial with his right to competent counsel.' *Williams* also emphasized the importance of assessing the totality of the respondent's conduct in relation to the delay — not simply counting how many continuances were attributed to the defense — to determine whether the respondent genuinely wanted a trial.

In re Butler (Terrance Butler) — (2020) 55 Cal.App.5th 614

A critical modern habeas case establishing that the habeas corpus remedy is available to SVP respondents who were denied a timely trial. Butler had been detained for 13 years awaiting trial on his SVP petition. More than 50 continuances were granted without objection or a finding of good cause. Despite the fact that much of the delay was attributable to the public defender's office, the court granted habeas relief because Butler had made sincere and repeated demands for a speedy trial — including a 2009 letter to his attorney explicitly stating he did not authorize the public defender to waive time on his behalf. *Butler* illustrates the central evidentiary requirement: the respondent must have asserted the right. Letters to attorneys and courts expressing the desire for trial are crucial evidence.

People v. DeCasas — (2020) 54 Cal.App.5th 785

DeCasas applied *Vasquez* and *Williams* to the SVP context and reinforced that delays resulting from systemic breakdown in the public defender system are attributed to the state, not the respondent. The court affirmed a dismissal where the SVP unit staff reductions constituted a systemic failure that caused delay — even though individual continuances had been formally requested by defense counsel. *DeCasas* is important for cases where counsel's continuances were not truly voluntary but were compelled by the institutional failure to staff the SVP unit adequately.

Camacho v. Superior Court — (2023) 15 Cal.5th 354, S273391

The California Supreme Court's most recent and definitive treatment of SVP pretrial delay. *Camacho* held that SVP respondents have a due process right to a timely trial, but that the right is analyzed under the *Barker* balancing test and that there is no presumption of prejudice for either party from delay. *Camacho* also expressly disapproved prior Court of Appeal decisions that had applied a presumption of prejudice. Critically for speedy trial habeas petitions, *Camacho* reaffirmed that defense-requested continuances weigh against the respondent's speedy trial claim — which means that a respondent who wants to bring a speedy trial habeas must show that the delays were not genuinely requested by, or attributable to, the defense. The Court also noted that receiving mental health services during the period of delay is a factor that reduces the finding of prejudice.

F. The Most Critical Evidentiary Requirement: Proof That the Respondent Asserted the Speedy Trial Right

Under *Barker v. Wingo*, one of the four factors is whether the accused asserted the right to a speedy trial. In the SVP context, this factor is often determinative. A respondent who sat silently through years of continuances without ever expressing a desire for trial — who did not object, did not write letters, did not put anything on the record — will have a very difficult time establishing a speedy trial violation. *Camacho* confirmed this: defense-requested or defense-acquiesced-to delays count against the respondent.

However, not all respondents have been silent. Many respondents in SVP cases have tried repeatedly to assert their right to trial and have been systematically ignored by overburdened or disengaged appointed counsel. *Butler* is the paradigmatic example: Terrance Butler wrote a letter to his public defender expressly stating he had not authorized a time waiver and wanted a trial as soon as possible — a letter his attorney received but did not act on. That letter, and the court's finding that Butler made 'sincere and repeated demands for a speedy trial,' was the foundation of the habeas relief.

Evidence of Speedy Trial Assertion: What to Look For

- **On-the-Record Statements:** Review every hearing transcript in the case history. Did the respondent ever appear in court and state, on the record, that he wanted a trial? Did he object when counsel requested a continuance? Did he tell the judge he wanted to go to trial? Any on-the-record statement asserting the speedy trial right is powerful evidence.

- **Letters to Attorneys:** Did the respondent ever write to his appointed attorney demanding trial? Even informal letters that express frustration with delay, request that counsel move the case forward, or explicitly state that the respondent does not consent to continuances constitute evidence of speedy trial assertion. These letters should be gathered and preserved as exhibits to the habeas petition.

- **Letters to the Court:** Did the respondent ever write directly to the judge expressing a desire for trial? Court communications from respondents in SVP cases are often logged but not formally responded to. Check the court file for any pro per filings, letters, or other communications from the respondent that document a desire for trial.

- **Marsden Motions:** Did the respondent ever bring a Marsden-type motion for new counsel in part because counsel was not moving the case forward? Marsden motions citing lack of progress toward trial, failure to prepare, or failure to communicate are evidence of the respondent's desire for a timely resolution.

- **The Hobson's Choice Scenario:** Did the respondent ever put on the record — or communicate through counsel — that he was only agreeing to a continuance because he was placed in an impossible choice between the right to a timely trial and the right to effective assistance of counsel? This is what courts call the 'Hobson's Choice,' recognized in *Vasquez*: the respondent is forced to choose between two constitutional rights because the public defender cannot be both prepared and timely. When a respondent agrees to a continuance under these circumstances — not because he wants delay, but because his attorney is not ready and going to trial with an unprepared attorney would be worse than waiting — that 'agreement' should not be counted against the respondent's speedy trial claim. If the respondent ever expressed this tension — on the record or in writing — that evidence should be in the habeas petition.

● **KEY POINT:** The respondent does not need to have been perfectly and persistently vocal at every hearing. *Barker* requires assessment of the totality of the respondent's conduct. The issue is not simply the number of times the accused acquiesced or objected; rather, the focus is on the surrounding circumstances, such as the timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, the accused's pretrial conduct (as that conduct bears on the speedy trial right), and so forth. A single sincere, documented demand — like Butler's 2009 letter — can be sufficient if the surrounding circumstances show the respondent genuinely wanted a trial and was denied one.

G. Constructing the Speedy Trial Habeas Petition: What It Must Contain

The speedy trial habeas petition must be a detailed, fact-specific document that chronicles the entire procedural history of the case and applies the *Barker/Camacho* framework to that history. The following elements are required:

1. **Complete Procedural History:** A chronological account of every hearing date, every continuance, and every reason for continuance as reflected in the record. This is frequently presented in a tabular format — hearing date, continuance reason, party requesting continuance, whether the respondent was present, whether the respondent objected — to make the pattern of delay clear to the reviewing court.
2. **Attribution Analysis:** For each period of delay, an analysis of whether the delay is attributable to the state (prosecution, court, or systemic public defender failure) or to the defense (including whether defense-attributed delays were genuinely voluntary or were the product of a Hobson's Choice). Cases like *Vasquez* and *DeCasas* provide the framework for arguing that delays formally requested by defense counsel are actually attributable to the state when the requests result from systemic breakdown.
3. **Evidence of Speedy Trial Assertion:** All documentary evidence that the respondent asserted the speedy trial right — on-the-record statements, letters to counsel, letters to the court, Marsden motions, and any Hobson's Choice statements. Include the actual documents as exhibits with accompanying foundational declarations.
4. **Prejudice Analysis:** Under *Barker*, the petitioner must show prejudice. In SVP cases, the prejudice from prolonged pretrial detention is real and multifaceted: the respondent has been institutionalized rather than treated in the community;

evaluators' opinions are based on a static institutional picture rather than community functioning; evidence of rehabilitation and change that accumulates over years is not reflected in the evaluation that controls the trial; witnesses may have become unavailable; the anxiety of unresolved proceedings has continued for years. Include specific, documented prejudice from the delay.

5. **Case Authority:** Cite and apply *Barker v. Wingo, Doggett v. United States, Mathews v. Eldridge, People v. Litmon, People v. Superior Court (Vasquez), People v. Williams, In re Butler, People v. DeCasas, and Camacho v. Superior Court*. Apply each case's specific holdings to the facts of the respondent's case.
6. **Prayer for Relief:** The appropriate remedy for a proven denial of the speedy trial right in SVP proceedings is dismissal of the petition with prejudice and release of the respondent from custody. *Vasquez* and *Litmon* confirm this. The petition must clearly state the relief sought.

H. Where to File the Habeas Petition

The habeas petition may be filed in the superior court in the county where the respondent is detained, or directly in the Court of Appeal having jurisdiction over that county. As a general rule of thumb, if a direct appeal is pending, the habeas petition should be filed in the Court of Appeal. If no appeal is pending, the petition is typically filed first in the superior court, with the right to renew in the Court of Appeal if relief is denied.

For SVP respondents detained at Coalinga State Hospital, the appropriate superior court is the Fresno County Superior Court, absent other considerations. However, the underlying SVP petition was filed in the county of the originating prosecution, and the habeas petition should be filed in the court with jurisdiction over the case — typically the court where the SVP proceeding is pending.

✔ **PRACTICE NOTE:** File the habeas petition in the Court of Appeal when possible, particularly for speedy trial claims. The Court of Appeal can act quickly and can grant the immediate relief — a stay of proceedings or an order to show cause — that stops the case from going to trial while the constitutional challenge is resolved. A habeas petition filed in the superior court may take longer to process, and in the meantime the trial date may arrive.

I. Simultaneous Obligations: Habeas and Trial Preparation

Filing a habeas petition does not relieve incoming counsel of the obligation to prepare for trial. Habeas proceedings can take months to resolve, and the trial date will not automatically be stayed simply because a habeas petition has been filed. The incoming attorney must pursue both tracks simultaneously: pursue habeas relief while also conducting the full trial preparation described in Section 5 of this handbook.

If the habeas petition is filed and a stay is not obtained before the trial date, counsel must be prepared to try the case. This means that incoming counsel cannot defer trial preparation until after the habeas is resolved. The preparation work — review of reports, retention of a defense evaluator, subpoena of treatment records, investigator interviews of facilitators, preparation of cross-examination — must proceed concurrently with the habeas litigation.

⚠ **Critical Reminder:** Taking over an SVP case from a prior attorney is not a license to start from scratch at a leisurely pace. The respondent has been detained — in many cases for years — and every day of continued confinement is a deprivation of liberty. Incoming counsel's first obligation, after assessing the prior attorney's performance and addressing any conflict issues, is to move the case forward — either through habeas relief or through trial — as quickly as the case's complexity permits. Delay for delay's sake is not an option.

SECTION 7: CONDITIONAL RELEASE; CONREP/LIBERTY

This section provides a comprehensive roadmap for attorneys representing clients who have been committed as Sexually Violent Predators (SVPs) under Welfare and Institutions Code section 6604 and who are seeking to achieve conditional or unconditional release. The statutory release framework spans sections 6604.9 through 6610, and an attorney who does not command this framework — and the growing body of case law that refines it — will be unable to protect a client's liberty interests. Release under the SVPA can and does take years after a court finds a client suitable for conditional placement; the case law is littered with examples of clients ordered out who waited many additional years before actually stepping through a door. Vigilance, strategic aggression, and a healthy skepticism of every representation made by Liberty Healthcare Corporation (Liberty), the state's contracted CONREP program director, are essential from day one.

A. Statutory Framework — WIC §§ 6604.9 Through 6610

Following commitment under section 6604, the SVPA creates two interconnected pathways toward release: the annual review track driven by the Department of State Hospitals (DSH), and the client-initiated petition track under section 6608. Understanding how these pathways operate — and how they interact — is the foundation of every release strategy.

§ 6604.9 — Annual Examination and Initial Review

Once committed, a client is entitled to an annual examination of his or her mental condition. Section 6604.9 provides that DSH must conduct this examination once every calendar year. The annual examination feeds into the section 6605 review process. Critically, *People v. Consiglio* (Cal. App. 4th Dist. 2022) 303 Cal. Rptr. 3d 9 holds that compliance with section 6604.9 is required for conditional release consideration but is not a prerequisite to unconditional discharge in all circumstances. Attorneys should note that the annual examination report is both a weapon and a target: it is a weapon when it

reflects treatment progress that supports release, and a target for cross-examination and challenge when it overstates risk or relies on methodologically improper conclusions.

§ 6605 — Show Cause Hearing / DSH-Initiated Discharge Review

Section 6605 creates the DSH-initiated review path. If the annual examination concludes the client no longer meets SVP criteria, DSH must notify the committing court and the designated county counsel. The committed person is also entitled to an annual written notice of the right to petition for conditional release under section 6608, and the notice must contain a waiver-of-rights form. If the client does not affirmatively waive this right, the court must set a show cause hearing to determine whether changed circumstances warrant a full hearing on unconditional discharge or conditional release.

At the show cause hearing, the court reviews the annual examination to determine whether there is probable cause to believe the person's condition has changed to the point he or she no longer meets SVP criteria. If the court finds probable cause, it sets a full trial-type hearing. The prosecution bears the burden of proving beyond a reasonable doubt that the client still meets SVP criteria at that full hearing. This DSH-initiated track is rare — DSH rarely certifies that a client is no longer dangerous — making the client-initiated petition under section 6608 the principal pathway for most clients.

ALERT: NEVER WAIVE THE SECTION 6605 ANNUAL NOTICE

Every year, DSH sends the client written notice of the right to petition for conditional release. If the client does not affirmatively waive this right in writing, the court is required to set a show cause hearing. The attorney should instruct the client never to sign the waiver portion of the annual notice without consulting counsel. Inadvertent waivers have repeatedly delayed release proceedings.

§ 6606 — Continuing Authority to Confine / Treatment Obligation

Section 6606 provides that DSH shall provide adequate and appropriate treatment for the committed person. The treatment obligation runs throughout commitment. If DSH fails to provide appropriate treatment — for example, by denying access to programming for extended periods, placing a client on indefinite waiting lists for SOTP modules, or failing to individualize a treatment plan — that failure may form the basis for a habeas corpus petition asserting that the civil commitment has become punitive in violation of due process. Document treatment access issues and wait times beginning on the first day of representation.

§ 6607 — DSH Recommendation for Conditional Release

Section 6607 is triggered when DSH itself determines the client's mental disorder has changed so that the client is no longer likely to commit acts of predatory sexual violence while under outpatient supervision and treatment. In that event, DSH must send a report and recommendation to the committing court, the designated county counsel, and the client's attorney. Upon receipt, the court must set a section 6608 hearing. The importance for the attorney is this: when DSH authorizes the petition — effectively agreeing the client is suitable — the burden at the section 6608 hearing shifts. Under *People v. Peyton* (2022) 81 Cal.App.5th 784, when DSH authorizes conditional release, the client is presumptively entitled to conditional release and the state bears the burden of showing by a preponderance of the evidence that conditional release is not appropriate. This is a significant litigation advantage.

§ 6608 — Petition for Conditional Release (Client-Initiated)

Section 6608 is the workhorse provision. After one year of commitment, the client may petition the court for conditional release at any time, regardless of DSH's position. The petition initiates a multi-step process:

1. The court performs an initial facial review of the petition to determine if it is supported by any competent evidence of changed circumstances. The standard for facial sufficiency is not frivolous — if any arguable legal or factual basis for the petition exists, it must proceed. (*People v. Smith* (2013) 216 Cal.App.4th 947 [*Smith I*].)
2. DSH evaluates the petition and submits a recommendation to the court.
3. The court holds a full evidentiary hearing at which the client bears the burden of proof by a preponderance of the evidence when petitioning on his or her own initiative.
4. The client is entitled to appointed counsel and to the appointment of expert witnesses. (§ 6608, subd. (a); *People v. McKee*.)
5. If the court finds the client would not be a danger if under supervision and treatment in the community, it orders conditional release and placement with the forensic conditional release program (Liberty Healthcare/CONREP) for one year.
6. Section 6608, subdivision (i) provides that **within 30 days after the court's finding, the committed person shall be placed in the community in accordance with the treatment and supervision plan, absent good cause.** *However, In re Stephenson (2024) 108 Cal.App.5th 1 holds that the 30-day clock is triggered not by the court's initial finding of suitability, but by the court's approval of a final placement plan with terms and conditions that satisfy public safety concerns. This critical distinction is discussed in detail in Part C.*

§ 6608.5 — Housing Assistance in County of Domicile

Section 6608.5 requires that an agency in the county of domicile provide assistance and consultation in the process of locating and securing housing for the committed person. This provision becomes important when Liberty Healthcare asserts that all housing options have been exhausted in the county of domicile. As discussed in Part D, an attorney must not accept Liberty's representations at face value — independent investigation is mandatory.

§ 6609 — Duration and Conditions of Conditional Release

Section 6609 governs what happens during the period of conditional release. The committed person is subject to supervision by the conditional release program and must comply with all conditions imposed by the court. The court retains jurisdiction and may revoke conditional release if the committed person violates program conditions. Revocation requires a hearing. CONREP supervision is intensive — often described as 24-hours-per-day, seven-days-per-week monitoring — with conditions far more restrictive than parole. The attorney should make this point repeatedly when challenging evaluator conclusions that the client is not ready for conditional release.

§ 6609.1 — Community Notification

Section 6609.1 mandates community notification requirements when a conditional release placement is proposed. DSH or its designee (Liberty) must notify the sheriff, police, district attorney, and county counsel for each of the following jurisdictions: (a) the community where the client may be released, (b) the community of last legal residence before commitment, and (c) the committing county. Notification must be given at least 30 days before DSH submits a recommendation. This notification process routinely generates public opposition that is weaponized by Liberty to claim communities are refusing to accept the client, thereby justifying further delay. The attorney must monitor these notifications, attend community meetings where practicable, and ensure the court is aware when Liberty inflates community opposition or fails to present a complete picture.

§ 6610 — Unconditional Discharge

Section 6610 addresses unconditional discharge. After a year of successful conditional release, the committed person may petition for unconditional discharge under section 6608, subdivision (m). The DSH annual evaluation process under section 6604.9 may also lead to an unconditional discharge recommendation. *People v. Consiglio* (2022) 303 Cal. Rptr. 3d 9 confirms that section 6604.9 compliance is required for conditional

release consideration but clarifies the interplay between the statutory tracks for discharge.

B. Release Timeline — From Commitment To Freedom

The following table presents the procedural timeline of the SVP release process, from commitment under section 6604 through unconditional discharge. Attorneys should use this as a planning tool to anticipate each phase and the strategic obligations it triggers.

Phase	Statute	Description / Process	Deadline
Commitment	§ 6604	Jury or court finds SVP beyond reasonable doubt; indefinite commitment to DSH Coalinga State Hospital	Day 0
Annual Exam	§ 6604.9	DSH conducts annual examination of mental condition; produces annual report including evaluation of suitability for conditional release and discharge	Every 12 months
Annual Notice	§ 6605(b)	DSH provides client with written notice of right to petition for conditional release. Client must NOT waive this right without counsel review.	Annually
Show Cause (DSH Track)	§ 6605	If annual exam indicates no longer meets SVP criteria, court holds show cause hearing. If probable cause found, full trial scheduled.	Set by court
6608 Petition Filed	§ 6608(a)	Client or DSH initiates petition for conditional release. Client may file after 1 year of commitment regardless of DSH position.	1 year+ after commitment
Facial Review	§ 6608(b)	Court reviews petition for facial sufficiency (non-frivolous standard per *Smith I*). Must proceed if any arguable basis exists.	Within days of filing
DSH Evaluation	§ 6608(c)	DSH evaluates client and submits recommendation. Liberty Healthcare (CONREP) provides input.	Weeks to months
6608 Hearing	§ 6608(d)	Full evidentiary hearing; client bears burden (unless DSH authorized petition, then burden shifts to state). If found suitable, court orders conditional release placement.	Set by court

Community Notification	§ 6609.1	Liberty notifies law enforcement, DA, county counsel in placement county and county of domicile. 30-day notice required.	30+ days before placement
Placement Hearings	§ 6608(i)	Court holds placement hearings to identify and approve housing. Clock toward 30-day release begins upon court approval of final placement plan, per In re Stephenson.	Ongoing; should be set every 30 days max
Transient Release	§ 6608; *Karsai*	If no fixed residence found after exhaustive search, court may order transient conditional release. No fixed residence is NOT a legal bar.	When exhaustive search fails
Community Placement	§ 6608(i)	Client physically released to CONREP supervision in community within 30 days of court-approved final plan, absent good cause.	30 days after plan approval
1-Year CONREP Review	§ 6609	After 1 year on conditional release, client entitled to unconditional discharge hearing.	12 months post-release
Unconditional Discharge	§§ 6608(m), 6610	Upon successful completion of CONREP and showing no longer meets SVP criteria, court may grant full discharge.	After 1 year on CONREP

PRACTICE NOTE: THE REAL TIMELINE IS LONGER — PLAN ACCORDINGLY

The statutory timeline above reflects what the SVPA provides. The real-world timeline has been much longer. In *People v. Superior Court* (*Karsai*) (2013) 213 Cal.App.4th 774, the court determined *Karsai* was suitable for conditional release in October 2010 — then the placement process consumed a year and a half before he was finally ordered out as a transient in early 2012. In *Price v. People* (2024), the court ordered Price out in October 2022, and he was still fighting placement over a year later. Clients who are found suitable for release but not yet placed are entitled to significant due process protection. The attorney must treat every month of post-suitability delay as a constitutional emergency and must be in court regularly pressing for compliance.

C. The 30-Day Clock — In Re Stephenson And Section 6608(i)

Section 6608, subdivision (i) provides that within 30 days after the court's finding, the committed person shall be placed in the community in accordance with the treatment and supervision plan, absent a showing of good cause. This language appears straightforward: 30 days from the court's finding of suitability. However, *In re Stephenson* (2024) 108 Cal.App.5th 1 interprets "the court's finding" differently, and the attorney must understand this interpretation to litigate placement delays effectively.

What Stephenson Holds

The *Stephenson* court held that the "finding" that starts the 30-day clock is not the initial determination that the client is suitable for conditional release. Instead, it is the court's approval of a final placement plan — that is, the court's determination of an appropriate conditional release placement, with specific terms and conditions that satisfy public safety concerns. Until the court approves a specific placement plan, the 30-day clock has not started.

This interpretation gives Liberty Healthcare and DSH a potential roadblock: as long as they fail to present an approvable placement plan, the 30-day deadline never begins. The attorney must refuse to allow this dynamic to operate in practice. The argument from the client's perspective — which is arguably supported by *Karsai* and *Price* — is that once a court finds a client suitable, that person has a significant liberty interest in being released, and unreasonable delay in developing and submitting a placement plan itself constitutes a due process violation.

CRITICAL: THE ATTORNEY MUST IMPOSE DEADLINES ON LIBERTY AND THE COURT

After a finding of suitability, the attorney should immediately move the court for a placement hearing schedule with hard deadlines — no more than 30 days between hearings. Request that the court order Liberty to submit a written status report before each hearing identifying: (1) specific housing options investigated, (2) contact dates and results, (3) reasons for any rejection, and (4) the next planned steps. This creates a record and prevents Liberty from consuming months with vague representations of progress.

Arguing the 30-Day Clock in the Alternative

Even under *Stephenson's* interpretation, the attorney has powerful arguments. Section 6608, subdivision (i) says that absent good cause, the client shall be placed within 30 days of the court's finding — and the *Stephenson* court itself acknowledges that due process constrains how long this process can take. Citing *Price v. People* (2024) and *People v. Superior Court* (*Karsai*) (2013) 213 Cal.App.4th 774, the attorney should argue that a finding of suitability creates a significant liberty interest, and that lengthy post-suitability detention without meaningful progress toward placement violates the client's constitutional rights. Once the client has been found suitable, each continuance must be supported by good cause — not just Liberty's assertion that placement is difficult.

D. Liberty Healthcare — Verify Everything

Liberty Healthcare Corporation contracts with the State of California to serve as the program director for the SVP CONREP program. Liberty is not a neutral party. It has institutional interests in maintaining manageable caseloads, minimizing public controversy, and avoiding placements that generate community opposition. The attorney must approach every representation Liberty makes — in reports, in declarations, and in court — with healthy skepticism and the resources to investigate independently.

The Hotel/Motel Example: A Cautionary Tale

In at least one documented case, Liberty presented to the court a list of hotels and motels in the placement area, representing that all had been contacted and none would accept an SVP resident. The client disputed this. He independently called establishments on the list and found that several had never been contacted by Liberty. When this was reported to counsel, an investigator was retained who confirmed Liberty had not contacted those establishments at all. The court was presented with this evidence, exposing Liberty's false representation.

ALERT: NEVER ACCEPT LIBERTY'S HOUSING REPRESENTATIONS AT FACE VALUE

Every time Liberty reports that housing options have been contacted and refused, the attorney must investigate independently. Retain an investigator. Have the investigator contact each listed property and document the results. If Liberty's list is inaccurate, bring it to the court's attention immediately. False representations to the

court are serious misconduct and may warrant sanctions, findings of bad faith, or — most importantly — orders overriding Liberty's objection and requiring immediate placement.

Demanding Regular Housing Committee Meetings

One of the most effective tools for preventing indefinite post-suitability delay is demanding that the court order Liberty and DSH to hold regularly scheduled housing committee meetings. The attorney should request, and the court should order:

1. Monthly housing committee meetings attended by Liberty, DSH, and representatives of the committing county and any proposed placement county.
2. Written minutes of each meeting submitted to the court within five business days.
3. A written housing search log to be maintained and produced at every placement hearing, identifying each property investigated, the date of contact, the contact person, and the outcome.
4. Attendance by the client's attorney at all housing committee meetings in an observer capacity.

Protective Orders for Housing Committee Communications

A persistent obstacle to effective housing placement is the reluctance of committee members to share information freely for fear of public records laws, community backlash, or liability. The attorney should seek protective orders from the court that:

- Designate housing committee communications and deliberations as confidential, to be filed under seal with the court.
- Shield committee members from personal liability for good-faith housing placement recommendations.
- Allow Law enforcement, DSH, Liberty, and the client's attorney to share assessment information, background materials, and placement preferences in a protected forum.

The goal is to create a functioning collaborative process. When Liberty can share information with law enforcement candidly — and law enforcement can share concerns directly with Liberty — placements can be negotiated rather than adjudicated.

Judicial Controls on Placement Delay

Following the authority of *Karsai* and *Price*, the attorney should seek the following judicial controls:

1. A placement hearing schedule set at the time of the suitability finding, with no gap between hearings exceeding 30 days.
2. At each hearing, Liberty must present specific evidence of housing efforts, not general status updates.
3. If Liberty cannot identify any suitable housing after a court-defined period (e.g., six months of active search), the court should be asked to consider ordering transient release.
4. If Liberty presents evidence of community opposition, the attorney should be permitted to cross-examine Liberty's representatives and to present independent evidence of the housing market in the placement area.

E. Transient Release — The Court Has Authority And Must Use It

People v. Superior Court (Karsai) (2013) 213 Cal.App.4th 774

Karsai is the foundational case establishing that a fixed residence is not legally required for conditional release under the SVPA. The court held that nothing in the SVPA precludes a court from ordering the conditional release of an SVP even where no fixed residence has been located before release. The court noted that the SVPA's conditional release provisions are designed to protect the public regardless of whether the person has a fixed address, because in every conditional release case the court has determined the person will pose no danger under outpatient supervision and treatment.

The practical significance of *Karsai* cannot be overstated. Without it, Liberty could effectively veto any conditional release simply by refusing to identify acceptable housing. *Karsai* eliminates that veto. After an exhaustive search has failed, the attorney has a clear legal basis to demand transient release.

KEY PRINCIPLE: NO FIXED RESIDENCE IS NOT A LEGAL BAR TO CONDITIONAL RELEASE

Once the court has found a client suitable for conditional release, Liberty cannot hold that release hostage indefinitely by failing to secure a fixed residence. After a documented exhaustive search, the attorney should move for transient release citing *Karsai*. The SVPA's supervision structure — intensive monitoring, check-in requirements, GPS tracking, mandatory programming — applies to transient releases as fully as to fixed-residence releases.

Justification: Why Fixed Residence Is Not Mandatory

The attorney should be prepared to argue the following affirmative justifications for transient release when fixed housing is unavailable:

1. Statutory text: Nothing in section 6608 or any related provision expressly requires a fixed residential address as a condition precedent to release. (*Karsai, supra*, 213 Cal.App.4th at p. 785.)
2. Structural protections: The CONREP program provides intensive supervision regardless of housing status, including GPS monitoring, daily check-ins, mandatory treatment sessions, and the ability to revoke conditional release immediately if conditions are violated.
3. Constitutional mandate: Once a court has found a client is not dangerous under community supervision, continuing to confine that person in a secure facility solely because of a housing obstacle violates the client's liberty interest under due process. (See *Karsai, supra*, at pp. 788–789; *Price v. People* (2024).)
4. Proportionality: The state may not impose indefinite incarceration — functionally identical to punitive imprisonment — as the price for a housing market failure that is itself partly the product of SVPA notification laws and the community's negative reaction to those notifications.
5. CASOMB findings: The California Sex Offender Management Board has formally recognized that SVP CONREP is underutilized and that barriers to placement, including community opposition and the notification system itself, are systemic rather than individual failures.

Exhaustive Search Requirement Before Transient Release Motion

The court in *Karsai* noted that the placement process involved an exhaustive but ultimately unsuccessful search for acceptable housing before transient release was ordered. The attorney must build the record of that exhaustive search — or expose Liberty's failure to conduct one — before bringing a transient release motion. The motion should include:

- A chronological log of all housing locations investigated, dates contacted, and outcomes.
- Declarations or testimony establishing that Liberty contacted these locations and documenting results.
- Evidence of the client's independent investigation where Liberty's representations appear inaccurate.
- Evidence regarding the county of domicile search and any efforts to identify housing in alternative counties.

- A declaration from the attorney or investigator attesting to the scope and results of independent verification.

Placement Outside County of Domicile

The client has the right to be considered for placement in a county other than the county of domicile. Under section 6608, the court must attempt to identify suitable housing in the county of domicile first, but there is no absolute prohibition on placement elsewhere. If the county of domicile has proven intractable — due to community opposition, NIMBY politics, or Liberty's poor relationship with local law enforcement — the attorney should move for an order authorizing Liberty to search in alternative counties. This motion should:

- Document the exhaustive nature of the county-of-domicile search.
- Identify one or more alternative counties where conditions appear more favorable.
- Address why extraordinary circumstances justify out-of-county placement.
- Invoke the transient release option as a backup if out-of-county placement also fails.

F. School Proximity Restrictions — *Gray* And *Cheek*

People v. Superior Court (Cheek) 87 Cal.App.5th 373

Section 6608, subdivision (f) prohibits placing an SVP on conditional release within one quarter mile of a public or private school providing instruction in kindergarten through grade 12. The *Cheek* case established a critical and troubling rule: a school, including a homeschool, may be established at any time to disqualify a proposed CONREP placement location. This means that after a placement is proposed, community members or law enforcement may establish a new educational program in the area — effectively a veto over any specific placement location.

The *Cheek* rule has been weaponized to block placements. The attorney must be aware that newly established programs appearing immediately after a placement is announced should be scrutinized for legitimacy. An entity claiming to be a school must actually be engaged in qualifying K-12 education — it cannot be a shell established solely to disqualify a placement.

Gray v. Superior Court (2025) 112 Cal.App.5th 935

Gray refined the definition of "public or private school" for purposes of the section 6608(f) exclusion. The court clarified that the entity in question must be a legitimately operating educational institution providing K-12 instruction. Not every entity calling itself a school qualifies. The attorney should examine any claimed school near a proposed placement location and determine:

- Whether the entity is legitimately registered as a school under applicable California law.
- Whether it provides actual K-12 instruction with enrolled students.
- Whether it was established before or after the placement was proposed.
- The physical relationship between the school's instructional spaces and the proposed placement address — the restriction applies to being within one quarter mile of the school, and the court must make factual findings about this distance.

PRACTICE NOTE: INVESTIGATE EVERY CLAIMED SCHOOL NEAR PROPOSED PLACEMENTS

When the People or Liberty object to a proposed placement on the grounds of a nearby school, do not simply concede the objection. Retain an investigator to document the school's registration, operating status, number of enrolled students, and the date the school was established relative to the date the placement was proposed. If the school was established after the placement was announced, argue that it was established for the improper purpose of blocking the release and does not qualify under the statute as interpreted by Gray. Demand the court hold an evidentiary hearing on the school's qualifications before sustaining the objection.

G. When To File A Section 6608 Petition

One of the most important strategic decisions an SVP attorney faces is determining when the client's circumstances are ripe for a section 6608 petition. The conventional answer — that a petition should wait until the client has completed SOTP and DSH recommends release — is legally wrong and strategically harmful. Case law and logic support filing in a variety of circumstances well before SOTP completion.

The SOTP Completion Myth — No Statutory Requirement

Annual evaluators routinely conclude that a client is not suitable for conditional release solely or primarily because the client has not completed the inpatient Sex Offender Treatment Program (SOTP) at Coalinga State Hospital. This conclusion reflects neither the law nor the research. There is no provision anywhere in sections 6604.9 through

6610, or anywhere else in the SVPA, that makes SOTP completion a prerequisite to conditional release. The statute requires only that the court find the client would not be a danger under community supervision and treatment — not that the client has completed a particular program.

People v. Superior Court (Ghilotti) (2002) 27 Cal.4th 888 — The Supreme Court held that the standard for conditional release is whether the client is not likely to engage in sexually violent criminal behavior due to his diagnosed mental disorder if under supervision and treatment in the community. SOTP completion is not part of the statutory test.

People v. Ingram (2024) 104 Cal.App.5th 1242 — Recent authority confirming that evaluators must apply the correct legal standard for conditional release suitability. An evaluator who substitutes SOTP completion for the statutory standard commits legal error.

People v. Smith (Smith I) (2013) 216 Cal.App.4th 947 — Established that a petition is not frivolous — and must proceed — if any arguable basis exists for challenging the client's suitability determination. Paraphilia NOS is not a valid mental disorder in many cases, and diagnostic weakness directly bears on release suitability.

KEY LEGAL PRINCIPLE: SOTP IS A FACTOR — NOT A REQUIREMENT

The SVPA requires courts to ask whether the client is dangerous under community supervision and treatment. SOTP is one relevant data point in answering that question — not a threshold condition. When an evaluator says the client is not ready for conditional release solely because SOTP is incomplete, the evaluator has committed material legal error. The attorney should challenge this conclusion at every hearing, beginning with the annual evaluation report and continuing through the section 6608 hearing.

Circumstances Favoring a Section 6608 Petition

An attorney should give serious consideration to filing a section 6608 petition in the following circumstances, even without SOTP completion:

1. Advancement to SOTP Module IV (or Equivalent Treatment Level)

When a client has been staffed from SOTP Module III to Module IV, DSH itself has recognized significant treatment progress. Module IV represents a near-completion stage of the inpatient program. An evaluator who concludes the client is not suitable despite Module IV placement is making a conclusion that the very treating institution

contradicts. The attorney should obtain records of the staffing decision and present them as evidence of the client's treatment trajectory.

2. Ancillary Groups Addressing Dynamic Risk Factors

Many clients at Coalinga who are not enrolled in formal SOTP modules participate in ancillary groups that directly address their individual Dynamic Risk Factors (DRFs). If the client has participated in groups addressing poor problem solving, impulsivity, negative emotionality, emotional self-regulation, and other identified DRFs, that participation is treatment. The attorney should document every ancillary group the client has attended, the topics covered, the client's attendance record, and any facilitator assessments of progress. This evidence supports the argument that the client has received effective treatment targeting the specific features that make him dangerous — regardless of whether that treatment occurred within the formal SOTP structure.

3. Age Over 62 — Actuarial Risk Reduction

Sexual recidivism risk declines substantially with age. Virtually all validated actuarial instruments — Static-99R, Static-2002R, and Stable-2007 — incorporate age as a risk-reducing factor. A client who has aged past 62 while confined may have a current actuarial risk score substantially below what it was at the time of commitment, even without treatment progress. The attorney should retain a forensic psychologist to prepare a current actuarial assessment that properly accounts for the client's age. If the evaluator's annual report fails to appropriately weight the age reduction, that is a challengeable methodological error.

4. Absence of Current DRF-Related Behavior

The civil commitment rationale is future-oriented: the SVP is confined because it is likely that he will engage in sexually violent criminal behavior if released. But if the client's treatment team reports reflect that there is no current manifestation of the dynamic risk factors that caused confinement — no impulsivity incidents, no anger dysregulation events, no rule violations, no concerning conduct — the justification for continued inpatient confinement is substantially weakened. The argument proceeds as follows: if the client's DRFs are currently quiescent, the risk that he will violate CONREP rules is reduced; if CONREP supervision is intensive enough to manage even clients with active DRFs, a client whose DRFs are currently dormant presents an even lower supervision risk.

5. The 'Current Behavior' Argument — CONREP Is the Appropriate Level of Supervision

This argument deserves special emphasis. The SVPA does not confine people as punishment — it confines them to prevent future dangerous conduct. If the client's prior bad behavior consisted of getting in trouble in the community, failing to follow rules outside the institution, or engaging in substance abuse in an unstructured environment, the argument is that CONREP supervision addresses all of those factors more effectively than continued inpatient confinement. CONREP provides 24/7 supervision,

random drug and alcohol testing, structured housing (or transient supervision with check-ins), mandatory treatment sessions, GPS monitoring, and immediate revocation authority. A client who is in Coalinga precisely because he cannot be trusted in an unstructured community can now be released into a structured community — one far more controlled than parole.

KEY ARGUMENT FOR THE SECTION 6608 HEARING

The statutory question is not whether the client has completed SOTP. The question is whether the client, under the intensive supervision and treatment of CONREP, is unlikely to engage in sexually violent criminal behavior. If the client's DRFs are currently inactive, his age has substantially reduced actuarial risk, and CONREP supervision is genuinely intensive, a well-prepared 6608 petition presents a strong case for release even without SOTP completion.

H. Challenging The Annual Evaluation When SOTP Is Incomplete

The annual evaluation report is the document that most directly controls whether a section 6608 petition proceeds and succeeds. When an evaluator recommends against conditional release solely or substantially because of SOTP incompleteness, the attorney has multiple avenues of challenge.

Challenge 1: Material Legal Error Under *Ghilotti*

People v. Superior Court (*Ghilotti*) (2002) 27 Cal.4th 888 established that an SVP evaluator who applies an incorrect legal standard commits material legal error that the court may reject. If an evaluator concludes the client is not suitable for conditional release because SOTP is incomplete — and if that conclusion rests on the implicit assumption that SOTP completion is a legal requirement — the evaluator has applied a standard not found in the statute. The attorney should cross-examine the evaluator on this point directly: ask whether there is any statutory provision that makes SOTP completion a prerequisite to conditional release, and whether the evaluator's opinion would change if the legal standard were correctly stated.

Challenge 2: SOTP as One Factor Among Many

Even if the evaluator does not treat SOTP completion as a legal prerequisite, the attorney may challenge the weight the evaluator assigns to it. SOTP is one factor that

may bear on treatment progress and risk reduction — but so are objective assessment results, age-related actuarial changes, institutional behavior, ancillary group participation, and CONREP's supervisory capacity. An opinion that assigns SOTP incompleteness overwhelming weight while discounting these other factors may reflect confirmation bias and failure to apply a comprehensive assessment methodology as required by *People v. Ingram* (2024) 104 Cal.App.5th 1242 and related authorities.

Challenge 3: Objective Assessment Evidence

Clinicians who rely on clinical impression and SOTP status while ignoring objective assessment results may be applying a methodology that is inconsistent with professional standards. Instruments such as the ABEL Assessment for Sexual Interest (AASI-3), Penile Plethysmography (PPG), Stable-2007, and Static-99R provide objective data about current risk and arousal patterns. If these instruments show reduced or absent deviant arousal, low dynamic risk scores, and favorable actuarial placement, an evaluator who ignores these findings in favor of SOTP status alone has failed to apply a complete scientific methodology. Retain a defense expert to provide a comprehensive actuarial and clinical assessment incorporating all relevant objective measures, and use that assessment to rebut the annual report.

Challenge 4: People v. *Smith I* — The Non-Frivolous Standard

People v. Smith (2013) 216 Cal.App.4th 947 (*Smith I*) reversed the trial court's dismissal of a section 6608 petition as frivolous where the petition challenged the validity of the evaluator's diagnosis. The court held that a petition is not frivolous if it raises any arguable legal or factual basis for the client's release. When an annual evaluation rests on a diagnosis that is methodologically vulnerable — such as Paraphilia NOS, Other Specified Paraphilic Disorder with nonconsent, or Pedophilic Disorder based on inference from prior offenses without objective assessment confirmation — *Smith I* supports arguing that the petition presents a non-frivolous challenge to the evaluator's conclusions, whether or not SOTP is complete.

Challenge 5: Diagnostic Validity Under *Smith I* and *Smith II*

People v. Smith (*Smith II*) (2022) 75 Cal.App.5th 332 further developed the principle that a petition challenging diagnostic validity is non-frivolous and must proceed. The *Smith II* court reversed the trial court's finding that the petition was frivolous where Smith challenged both the validity of his diagnosis — Other Specified Paraphilic Disorder (formerly Paraphilia NOS) — and the adequacy of the evaluation methodology. The court's review of the petition showed that such diagnoses carry significant scientific controversy, and that an evaluator who applies a contested and potentially invalid

diagnosis as the basis for a conditional release denial has applied a methodology that the court may reject. Attorneys should not treat the SVP evaluator's diagnosis as carved in stone; challenge it with independent expert opinion, published scientific literature, and cross-examination exposing the methodological weaknesses.

PRACTICE NOTE: BUILD THE CHALLENGE TO SOTP-BASED DENIALS OVER MULTIPLE ANNUAL CYCLES

Rarely will a single motion or single hearing resolve a systemic evaluator bias toward SOTP completion as a prerequisite. Build the record over multiple annual evaluations: obtain the evaluator's prior reports, note each year whether SOTP completion status was cited, and establish through cross-examination that the evaluator has applied a consistent non-statutory standard. This pattern evidence may support a Ghilotti motion for legal error, a Marsden motion for new evaluators, or a showing to the court that the annual evaluation process has become a rubber stamp.

I. Ghilotti Motions — Challenging Evaluator Legal Error

People v. Superior Court (*Ghilotti*) (2002) 27 Cal.4th 888 recognized that a court has inherent authority to reject an SVP evaluator's recommendation where the recommendation stems from an inaccurate understanding of the legal criteria — i.e., material legal error. This authority applies not only to commitment proceedings but also to annual evaluations and section 6608 proceedings.

Grounds for a Ghilotti Motion in the Conditional Release Context

In the conditional release context, a *Ghilotti* motion may lie when an evaluator:

- Applies SOTP completion as a legal prerequisite to conditional release not found in the statute.
- Fails to apply the correct statutory standard — whether the client is likely to engage in sexually violent criminal behavior if under supervision and treatment in the community.
- Ignores or improperly discounts objective assessment data (actuarial instruments, PPG, AASI) in reaching a clinical conclusion.

- Relies on a diagnosis — such as Paraphilia NOS or Other Specified Paraphilic Disorder — that is methodologically invalid or inconsistent with DSM-5 diagnostic criteria.
- Uses a scoring methodology for Stable-2007 or Static-99R that is inconsistent with the instrument's validated scoring rules — for example, scoring dynamic risk factors based on historical records rather than current presentation, or including non-sexual offense items in Static-99R calculations without justification.

The *Ghilotti* motion should be supported by a written brief identifying the specific legal error, the evaluator's statement containing the error, the correct legal standard, and expert declaration establishing that the evaluator deviated from both the statute and professional forensic standards. Request that the court direct DSH to provide a new evaluation applying the correct standard.

J. Due Process Tools — Protecting The Client's Rights During Placement Delay

After a finding of suitability, the attorney must shift from litigation mode to enforcement mode. Every month of post-suitability delay is additional liberty deprivation. The following tools are available to compress the timeline.

Habeas Corpus — The Primary Remedy for Placement Delay

Where placement proceedings have stalled beyond a reasonable period following a suitability finding, habeas corpus is the appropriate remedy. *Price v. People* (2024) is a model: Price was found suitable in October 2022, and by July 2023 — nine months later — he had still not been placed. He filed a habeas petition in the Court of Appeal, which found he had established a prima facie case that continued delay impinged on his significant liberty interest. The court issued an order to show cause requiring the superior court to hold a hearing, with specific instructions: the court must consider whether transient release without housing is required by law, must allow the client to address evidentiary concerns about his release, and must make explicit factual findings if good cause for further continuance is found.

File the habeas petition in the Court of Appeal rather than the superior court when possible. The Court of Appeal can act quickly and issue stays or orders to show cause that immediately accelerate the process at the trial court level.

Motion for Contempt or Sanctions Against Liberty

If Liberty has made materially false representations to the court — for example, falsely representing that it contacted housing providers when it did not — the court has authority to impose sanctions for misrepresentation. Where Liberty's conduct is found to be in bad faith or contemptuous of the court's orders, the attorney should bring a motion for sanctions supported by a declaration from the investigator who verified Liberty's failure. At minimum, such a motion demonstrates to the court that Liberty cannot be trusted and that its representations require independent corroboration.

Motion for Court-Ordered Housing Timeline

Request that the court issue a concrete order, following the suitability finding, requiring Liberty to: (1) identify no fewer than five specific housing options per month; (2) submit monthly written reports with contact logs; (3) appear in person at monthly placement hearings; and (4) provide the client's attorney with copies of all contact logs and correspondence. This order should specify that failure to comply will result in a hearing on contempt and on transient release.

Writ of Mandate — Compelling Ministerial Acts

Where Liberty or DSH has an arguably ministerial duty — for example, to conduct a housing search in a reasonable manner, or to comply with the court's placement orders — a writ of mandate may lie under Code of Civil Procedure section 1085 to compel that duty. This writ remedy is particularly appropriate where the superior court has declined to enforce its own orders. File in the Court of Appeal.

K. Complete Section 6608 Strategic Checklist

PRE-PETITION PREPARATION

- ✓ Review all annual evaluation reports for SOTP-based denial language — prepare *Ghilotti* challenge
- ✓ Obtain all treatment team reports, housing committee minutes, and ancillary group records
- ✓ Retain independent forensic psychologist for comprehensive actuarial and clinical assessment
- ✓ Obtain ABEL/AASI-3, PPG, Stable-2007, and Static-99R scores — compare

to evaluator's scoring
- ✓ Document client's age, module advancement status, DRF behavioral record, and ancillary group participation
- ✓ Review annual notice from DSH — instruct client NOT to waive section 6605 rights
- ✓ Assess whether petition is warranted now or after additional documented treatment progress

FILING THE PETITION
- ✓ File under section 6608 after one year of commitment — do not wait for SOTP completion
- ✓ Request appointment of independent expert witness pursuant to section 6608, subdivision (a)
- ✓ Include affirmative statement that petition is not frivolous under *Smith I* standard
- ✓ If petition challenges diagnostic validity, include *Smith I* / *Smith II* discussion
- ✓ File *Ghilotti* motion concurrently if annual evaluation reflects material legal error

AT THE SECTION 6608 HEARING
- ✓ Present independent expert on actuarial risk reduction, treatment progress, CONREP adequacy
- ✓ Cross-examine DSH evaluator on absence of statutory SOTP requirement
- ✓ Cross-examine on diagnostic methodology — challenge Paraphilia NOS/OSPD/hebephilia diagnoses
- ✓ Present evidence of current DRF status — behavioral records, treatment notes, facilitator testimony
- ✓ Argue CONREP supervisory capacity is adequate to manage current risk level
- ✓ Present age-related actuarial evidence if client is 62 or older

AFTER A SUITABILITY FINDING — PLACEMENT ENFORCEMENT
- ✓ Immediately request court-ordered monthly placement hearing schedule

- ✓ Request order for Liberty to submit monthly housing contact logs
- ✓ Request protective order for housing committee communications
- ✓ Retain investigator to independently verify Liberty's housing contact claims
- ✓ Monitor school proximity objections — investigate any claimed school for *Gray* / *Cheek* compliance
- ✓ After 6 months without placement, file motion for transient release citing *Karsai*
- ✓ If delay exceeds 12 months, file habeas corpus petition in Court of Appeal citing *Price v. People*
- ✓ Move for sanctions/contempt if Liberty makes false representations to the court

L. Key Case Law Reference

People v. Superior Court (Ghilotti) (2002) 27 Cal.4th 888 — Courts may reject an SVP evaluator's recommendation when it stems from material legal error — i.e., application of an incorrect legal standard. Foundation for challenging SOTP-prerequisite opinions.

People v. Smith (Smith I) (2013) 216 Cal.App.4th 947 — Section 6608 petition is not frivolous if any arguable basis exists. Established that challenges to diagnostic validity (Paraphilia NOS) defeat frivolousness findings and require the petition to proceed.

People v. Smith (Smith II) (2022) 75 Cal.App.5th 332 — Further developed Smith I principles. Clarified the section 6608 release process under sections 6608 and 6605. Petition challenging OSPD/Paraphilia NOS diagnosis is non-frivolous and must receive a full hearing.

People v. Consiglio (Cal. App. 4th Dist. 2022) 303 Cal. Rptr. 3d 9 — Section 6604.9 annual examination is required for at least conditional release consideration, but not necessarily for unconditional discharge in all circumstances. Clarifies relationship between statutory tracks.

People v. Superior Court (Karsai) (2013) 213 Cal.App.4th 774 — Nothing in the SVPA prohibits conditional release as a transient — without a fixed residence. Fixed address is not a legal prerequisite to CONREP placement. Foundational authority for transient release motions.

People v. Superior Court (Cheek) 87 Cal.App.5th 373 — A school — including a homeschool — may be established at any time to invoke the section 6608(f) one-quarter-mile exclusion zone, disqualifying a proposed SVP placement.

Gray v. Superior Court (2025) 112 Cal.App.5th 935 — Refined the definition of "public or private school" for section 6608(f) exclusion purposes. An entity must be legitimately engaged in K-12 instruction to qualify — mere appearance or recent establishment not sufficient.

In re Stephenson (2024) 108 Cal.App.5th 1 — The 30-day clock in section 6608(i) begins upon the court's approval of a final placement plan, not upon the initial suitability finding. Attorney must press for placement plan development as aggressively as for the suitability finding itself.

People v. Ingram (2024) 104 Cal.App.5th 1242 — Recent authority confirming evaluators must apply the correct legal standard for conditional release. Evaluators who deviate from the statutory test or ignore objective assessment data commit challengeable error.

Price v. The People (2024) [3rd Dist. COA] — Nine-month post-suitability delay without placement impairs a significant liberty interest. Habeas corpus is available. Court of Appeal issued order to show cause requiring explicit good-cause findings for continued delay and consideration of transient release.

People v. Peyton (2022) 81 Cal.App.5th 784 — When DSH authorizes the section 6608 petition, the burden at the hearing shifts — the SVP is presumptively entitled to conditional release and the state bears the burden of showing release is not appropriate by a preponderance.

Section 7 — End

SECTION 8: PROBABLE CAUSE / TRIAL WAIVERS

Of all the tactical errors an SVP defense attorney can make, perhaps none is more consequential — or more common — than advising a client to waive the probable cause hearing or, worse, the commitment trial itself. These are not procedural technicalities. They are the client's statutory rights, won through hard-fought litigation, to force the government to prove its case in an adversarial setting with a defense expert, cross-examination, and a neutral fact-finder. When an attorney waves those rights away with the phrase 'probable cause is just a formality,' that attorney has substituted their own judgment for the legislature's deliberate choice to protect the accused. That substitution may constitute ineffective assistance of counsel. This section explains why waivers are almost never appropriate, how to structure the hearing and trial advocacy that waivers would have surrendered, and why the client must be fully counseled on the lifelong collateral consequences that follow an SVP commitment — consequences that make fighting every stage of the proceeding not just advisable, but essential.

A. The Probable Cause Hearing Is Not A Formality

The assertion that a probable cause hearing under Welfare and Institutions Code section 6602 is 'just a formality' is factually wrong, legally unsupportable, and professionally dangerous. It is the kind of advice that gets attorneys reported to the State Bar and habeas corpus petitions filed against them years later. The attorney who gives this advice has likely never carefully read section 6602, studied the case law governing the hearing, or prepared a defense expert for cross-examination. The attorney who regularly waives probable cause is an attorney who has decided — without legal basis — that their client cannot win. That decision belongs to the client, not the lawyer, and only after the client has been fully informed.

What the Statute Guarantees

Welfare and Institutions Code section 6602 provides the committed person with:

1. The right to be represented by counsel at the probable cause hearing.

2. The right to have the petition and supporting documents reviewed by the court at a hearing at which the person has the right to appear personally.
3. The right to cross-examine witnesses called by the state.
4. The right to present evidence on the person's behalf.

Section 6602, subdivision (a) also requires that the hearing be held within ten days after the person's arraignment unless continued for good cause. This timeline is a protection — it is designed to prevent the state from holding a person indefinitely while building its case. An attorney who waives the hearing eliminates this protection and hands the state additional time without cost.

The Defense Expert Entitlement

The most significant right the probable cause hearing preserves is the right to a defense-retained expert evaluation before the hearing proceeds. Section 6602 envisions an adversarial process: the state presents its evaluators' conclusions, and the defense may challenge them with an independent expert. When an attorney waives the probable cause hearing, this opportunity evaporates. The client has now been routed directly to trial without any independent expert review of the state's evidence, without any cross-examination of the state's evaluators, and without any judicial assessment of whether the state's evidence is even sufficient to support a finding of probable cause.

CRITICAL: WAIVING PROBABLE CAUSE ELIMINATES THE DEFENSE EXPERT AT THAT STAGE

The probable cause hearing is the first formal adversarial proceeding at which a defense expert can present findings to a court. An attorney who waives this hearing, without retaining an independent expert and without obtaining a knowing, intelligent, and voluntary waiver from a fully informed client, has likely provided ineffective assistance of counsel. Document every client meeting at which the probable cause hearing is discussed, and document the client's decision in writing with the client's signature.

The 'Just a Formality' Myth — Why It Is Wrong

The probable cause standard — whether there is probable cause to believe the respondent is likely to engage in sexually violent criminal behavior — is a real, substantive legal standard. It is not an automatic rubber stamp. Probable cause hearings in SVP proceedings are winnable. They are won on grounds including:

- The state's evaluator applied an incorrect legal standard for what constitutes 'likely to engage in sexually violent criminal behavior.' (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888.)
- The diagnosis relied upon by the state's evaluators is scientifically invalid or methodologically flawed. (*People v. Smith* (*Smith I*) (2013) 216 Cal.App.4th 947.)
- The Static-99R, Static-2002R, or Stable-2007 scores have been miscalculated, misapplied, or the evaluator has failed to account for age-related risk reduction.
- The prior qualifying offenses do not legally constitute 'sexually violent offenses' under WIC section 6600, subdivision (b).
- The diagnostic criteria for the charged mental disorder have not been met — for example, a diagnosis of Pedophilic Disorder based solely on offense history without objective assessment confirmation.
- The evaluators failed to account for evidence of change in the respondent's condition that undercuts the likelihood-of-reoffense conclusion.

Any one of these grounds, if supported by a defense expert or by cross-examination exposing the state's evaluator's methodological errors, can result in a finding of no probable cause and dismissal of the SVP petition. That outcome is forever foreclosed if the attorney waives the hearing.

B. The Ineffective Assistance Trap — How Waivers Become IAC Claims

An attorney who advises a client to waive the probable cause hearing without fully informing the client of the rights being surrendered, and without investigating whether any viable defense exists, is walking directly into an ineffective assistance of counsel (IAC) claim under *Strickland v. Washington* (1984) 466 U.S. 668 and *People v. Ledesma* (1987) 43 Cal.3d 171. The two-part test — deficient performance and prejudice — will often be satisfied when a probable cause waiver eliminates a viable defense.

Deficient Performance

Defense counsel performs deficiently when they advise a waiver without:

1. Reviewing the state's evaluation reports in detail and identifying potential methodological, diagnostic, or legal errors.

2. Consulting with a qualified forensic psychologist about the strength of the state's case and the viability of a challenge.
3. Researching whether the diagnosis charged is scientifically supported and properly applied to this client.
4. Advising the client fully and accurately about the rights being waived and the potential consequences of the waiver.
5. Obtaining a documented, informed waiver from the client in writing.

An attorney who waives the probable cause hearing because 'these hearings never work' has performed deficiently. That generalization, untethered from analysis of the specific case, is not a legal conclusion — it is an abdication of professional responsibility.

Prejudice

The prejudice inquiry asks whether, but for counsel's deficient performance, there is a reasonable probability the outcome would have been different. In the SVP probable cause context, prejudice is established if:

- A retained defense expert, had one been consulted, would have identified specific errors in the state's evaluation that could have supported a finding of no probable cause.
- Cross-examination of the state's evaluators, had the hearing proceeded, would have exposed methodological deficiencies sufficient to undermine the probable cause finding.
- The diagnostic basis for the petition was factually or legally insufficient on its face — for example, where the state's evaluator diagnosed Pedophilic Disorder based solely on prior conviction records without contemporaneous objective assessment.

PRACTICE NOTE: DOCUMENT EVERY WAIVER DISCUSSION IN WRITING

Whenever a client asks about waiving the probable cause hearing or the trial, or whenever the attorney is considering raising this option, the discussion must be documented with specificity. A memo to file — dated, signed, and retained — should reflect: (1) what information was provided to the client; (2) what alternatives were explained; (3) what the client's specific reasons for considering a waiver were; (4) whether the attorney recommended against the waiver; and (5) if the client insisted on the waiver over counsel's advice, that the waiver was the client's free and voluntary decision. This documentation is the attorney's primary protection in any subsequent IAC proceeding.

C. Evaluators Make Errors — The Attorney's Job Is To Find Them

One of the most persistent and damaging myths in SVP defense practice is that the state's forensic evaluators are neutral scientists whose conclusions are entitled to deference. They are not neutral. They are retained by the Department of State Hospitals as part of a regulatory process with a built-in selection effect: evaluators who consistently fail to find SVP criteria rarely remain on the evaluation panel. More fundamentally, forensic evaluation is not a hard science. It involves diagnostic judgment calls, instrument scoring decisions, and risk assessment conclusions — all of which are contestable with appropriate expertise and preparation.

Why Evaluators Go Unchallenged — and Why They Shouldn't

SVP evaluators have operated with minimal adversarial scrutiny for most of the SVPA's existence. The reasons are familiar to anyone who has practiced in this area: the cases are complex, the forensic psychology literature is dense, the instruments are technical, and defense attorneys often do not have the background to challenge evaluators effectively. As a result, evaluators have adapted their practice to an environment in which their reports are rarely challenged in depth. Some evaluators have become sloppy. Some have developed diagnostic conclusions that they apply reflexively. Some score risk assessment instruments in ways that are demonstrably inconsistent with the instrument's validated scoring rules. The attorney who walks into a probable cause hearing or trial prepared to challenge every major conclusion in the evaluation report will frequently find significant errors.

Categories of Evaluator Error — What to Look For

The following categories of error appear with regularity in SVP evaluation reports. Counsel must review every evaluation for each of these problems:

1. Diagnostic Errors

- Diagnosing Pedophilic Disorder based on offense history alone without objective assessment evidence (ABEL/AASI-3, PPG) confirming deviant arousal to children.
- Using the now-rejected diagnosis of Paraphilia NOS, Nonconsent (renamed Other Specified Paraphilic Disorder, Nonconsent) — a diagnosis the DSM-5 committee rejected five times as lacking scientific validity. (*People v. Smith* (*Smith I*) (2013) 216 Cal.App.4th 947; Allen Frances et al., DSM rejection history.)

- Misapplying hebephilia (sexual attraction to pubescent minors aged 11-14) as a diagnosable paraphilia when it does not appear in the DSM-5 and lacks scientific consensus as a mental disorder.
- Diagnosing Antisocial Personality Disorder (ASPD) as the qualifying mental disorder — courts have required careful scrutiny of whether ASPD alone, which affects large portions of the prison population, constitutes a qualifying diagnosed mental disorder under WIC section 6600.
- Combining a weak paraphilia diagnosis with ASPD to 'bootstrap' to a commitment — what courts have sometimes called 'diagnosis stacking.'

2. Actuarial Instrument Scoring Errors

- Incorrect age coding on Static-99R — the age correction factor significantly reduces scores for men over 60 and must be applied consistently with the instrument's scoring manual.
- Counting non-sexual offenses as sex offense 'priors' or miscategorizing prior convictions in Static-99R item scoring.
- Failure to apply the Static-99R high-risk/need normative sample when the evaluator uses routine norms or vice versa — the evaluator must justify which comparison sample is used.
- Stable-2007 items scored based on historical records rather than current clinical presentation — Stable-2007 is a dynamic instrument designed to assess current functioning, not past behavior.
- Conflating Static-99R 'well above average risk' with 'likely to reoffend' — these are not equivalent. Static-99R provides a relative risk comparison within a population of convicted sex offenders, not an absolute recidivism probability.

3. Volitional Impairment Failures

The SVPA requires that the diagnosed mental disorder affect the person's emotional or volitional capacity so as to predispose them to sexually violent criminal acts. (WIC § 6600, subd. (c).) *Kansas v. Crane* (2002) 534 U.S. 407 requires that there be proof of serious difficulty controlling behavior — not mere propensity. Evaluators who recite the volitional impairment conclusion without specific behavioral evidence supporting it have provided an opinion that falls short of the constitutional minimum. Cross-examination should press evaluators on exactly what behaviors they observed, or what clinical data they relied upon, to conclude that the respondent has serious difficulty controlling sexually violent behavior.

4. Failure to Account for Change Since Prior Offenses

- Relying primarily on facts of prior offenses that occurred decades ago while giving insufficient weight to the person's current mental state, treatment participation, and institutional conduct.
- Ignoring objective assessment data — ABEL/AASI-3 results, PPG findings — that contradict the diagnostic conclusion.
- Failing to apply age as a risk-reducing factor in the clinical formulation despite substantial empirical literature demonstrating recidivism decline with age. (See Hanson, 2002; Barbaree & Blanchard, 2008.)
- Discounting ancillary treatment participation and program completion when these directly address the evaluator's stated Dynamic Risk Factors.

5. Misapplication of the Legal Standard

People v. Superior Court (*Ghilotti*) (2002) 27 Cal.4th 888 established that an evaluator commits material legal error by applying too high or too low a threshold for 'likely to engage in sexually violent criminal behavior.' The standard is not 'possible,' 'conceivable,' or 'cannot be ruled out.' It is also not 'more likely than not' in the pure statistical sense. It requires that the mental disorder currently predisposes the person to engage in sexually violent criminal acts — meaning the disorder is presently operative and its effect is a meaningful, real-world risk of sexually violent reoffending. Evaluators who apply a 'can't be ruled out' standard understate what the statute requires. Cross-examination on this precise point has produced some of the most significant hearing victories in SVP practice.

KEY PRINCIPLE: THE EVALUATION IS NOT EVIDENCE — IT IS A STARTING POINT

An SVP evaluation report is the beginning of the defense attorney's work, not the end of it. Every conclusion in the report is contestable. Every diagnostic judgment call can be examined. Every actuarial score can be verified against the instrument's scoring manual. Every clinical opinion can be challenged by a qualified defense expert. The attorney who treats the state's evaluation as dispositive has failed to perform their job.

D. The Commitment Trial — Why Waiving It Is Almost Never Appropriate

The decision to waive the commitment trial is the client's alone — but an attorney who allows a client to make that decision without a full and thorough explanation of every available defense, every trial challenge, and every consequence of commitment has not discharged their duty of representation. If the client ultimately insists on waiving the trial, counsel must make every effort to talk them out of it, document those efforts, and obtain a knowing, intelligent, and voluntary waiver that is placed on the record.

The Trial as the Definitive Adversarial Forum

The SVP commitment trial is the most important proceeding in the SVPA process. It is where the state bears the burden of proof beyond a reasonable doubt. It is where the defense expert faces the state's evaluators in the only setting where a jury — not a judge alone — evaluates the competing expert conclusions. Jury trials in SVP proceedings are winnable. They are not won by showing the person is a good person or that they deserve sympathy. They are won by demonstrating, through rigorous cross-examination and compelling defense expert testimony, that the state's case does not meet the constitutional standard of proof beyond a reasonable doubt.

Trial Defenses That Waivers Surrender

The following defenses are available at trial and are surrendered by a trial waiver:

Defense 1: The 'Current' Mental Disorder Requirement

WIC section 6600 requires a 'diagnosed mental disorder' — and the courts have consistently held that the disorder must be currently operative, not merely historically present. An evaluator who diagnoses a mental disorder based primarily on prior offense facts from decades past, with little or no evidence of current disorder manifestation, has failed to establish a current mental disorder as required by the statute. The defense expert can present evidence that the respondent's condition has changed materially since the qualifying offenses, that there is no current behavioral manifestation of the disorder, and that the diagnosis is unsupported by contemporary clinical data.

Defense 2: Lack of Volitional Impairment — *Kansas v. Crane*

The United States Supreme Court in *Kansas v. Crane* (2002) 534 U.S. 407 held that civil commitment as a sexual predator requires proof that the person has serious difficulty in controlling behavior — not merely a propensity to reoffend. This constitutional floor must be met in every California SVP case. At trial, the defense

expert can testify that the respondent's institutional behavior demonstrates adequate impulse control, that treatment participation has meaningfully addressed volitional functioning, and that the state's evidence of volitional impairment is insufficient under Crane.

Defense 3: Actuarial Risk Does Not Mean 'Likely to Reoffend'

The static actuarial instruments — Static-99R and Static-2002R — produce relative risk comparisons, not absolute recidivism probabilities. A 'high risk' Static-99R score does not mean the person will reoffend; it means the person scores higher on historical risk factors than a comparison group of convicted sex offenders. The defense expert can explain to the jury that even persons in the 'well above average' Static-99R category do not reoffend at majority rates over any standard follow-up period studied in the empirical literature, and that individual factors — age, treatment, absence of dynamic risk factors — substantially reduce even a high static score.

Defense 4: Age-Related Risk Reduction

The empirical literature consistently demonstrates that sexual recidivism risk declines substantially with age. This decline is reflected in Static-99R age corrections, in the Stable-2007 dynamic items, and in decades of longitudinal recidivism studies. A 60-year-old respondent's actuarial risk profile is fundamentally different from that of a 30-year-old respondent, even with identical prior offense histories. At trial, the defense expert can present this actuarial and empirical evidence, and explain to the jury why age is one of the most powerful protective factors available.

Defense 5: Diagnostic Invalidity

As discussed in Part C, many SVP diagnoses are methodologically vulnerable. At trial — unlike at the probable cause stage — the defense has the full resources of a jury trial to present the scientific critique of contested diagnoses. Expert witnesses can explain the history of the DSM committee's rejection of Coercive Paraphilia / Paraphilia NOS Nonconsent diagnoses, the absence of hebephilia from the DSM-5, the limitations of Pedophilic Disorder diagnoses based on offense history without objective arousal assessment, and the risk that evaluators are using psychiatric diagnosis to launder what is actually a future dangerousness prediction unsupported by sufficient clinical evidence.

Defense 6: Dynamic Risk Factor Status at Time of Trial

Dynamic Risk Factors (DRFs) — including sexual preoccupation, impulsivity, negative emotionality, and poor problem solving — are theorized to mediate the path from mental disorder to sexually violent behavior. An evaluator who concludes DRFs are present must be challenged on the specific evidence. If treatment records, incident reports, and Treatment Team reports from the year preceding trial show no behavioral manifestation of the DRFs the evaluator identified, that absence of current behavioral evidence directly contradicts the conclusion that a current mental disorder is predisposing the respondent to sexually violent reoffense.

Defense 7: Objective Assessment Evidence

ABEL/AASI-3, PPG, and other objective assessment instruments produce data about current arousal patterns and interests. If these instruments show absent or reduced deviant sexual arousal to children or to coercive sexual scenarios, that data directly contradicts a diagnosis premised on deviant arousal. At trial, the defense expert can present this objective data and explain to the jury why the evaluator's subjective clinical impression — based on reviewing prior offense records — is less reliable than objective physiological or self-report assessment data collected under controlled conditions.

ALERT: ONCE THE CLIENT WAIVES TRIAL, ALL OF THESE DEFENSES ARE GONE

Every defense listed above requires a trial — a live hearing with witnesses, cross-examination, and a fact-finder. A trial waiver eliminates every single one of them. The client who waives trial may believe they are 'getting it over with' or 'avoiding publicity.' What they are actually doing is accepting a civil commitment with all its lifelong consequences, without requiring the government to prove its case beyond a reasonable doubt. The attorney must make sure the client fully understands this before any waiver is entertained.

E. Collateral Consequences Of SVP Commitment — What The Client Must Know

What the Client Must Know — SVP-Specific Consequences Only

SCOPE OF THIS SECTION

This section addresses only those consequences that arise specifically from an SVP commitment under the Sexually Violent Predator Act (WIC §§ 6600–6609.3) — consequences that go beyond, or are categorically different from, those that apply to sex offenders generally. The purpose is to ensure that any client considering a waiver of the probable cause hearing or commitment trial understands what an SVP designation, as distinct from any underlying conviction alone, actually means for the rest of their life.

A client who waives either proceeding without understanding these SVP-specific consequences has not given a knowing and voluntary waiver. Counsel has an independent obligation to ensure this counseling occurs and is documented before any waiver discussion proceeds.

I. Indefinite Civil Detention with No Guaranteed Release

The foundational consequence of an SVP commitment is the one clients most often underestimate: civil confinement that has no fixed endpoint, is not governed by a determinate sentence, and continues until the State agrees the person no longer meets commitment criteria or a court orders release. This is categorically different from a criminal sentence.

Consequence	Authority	SVP-Specific Impact
Indeterminate Commitment	WIC § 6604	An SVP commitment is for an indeterminate term — not a fixed number of years. Commitment continues until the person is found to no longer meet SVP criteria. There is no 'sentence completion' date. The state bears no obligation to offer release until annual review produces a contrary finding.
Annual DSH Review — Not Automatic Release	WIC § 6605	DSH is required to conduct an annual examination of the committed person's mental condition. However, this is an internal administrative review — not a court proceeding. Release requires DSH to certify changed condition, followed by a court petition and contested hearing. The burden structure, in practice, heavily favors continued confinement.
Petition for Unconditional Discharge — Difficult Standard	WIC § 6605(b); *People v. Smith* (2013) 216 Cal.App.4th 947	A committed person may petition the court for release, but must establish by a preponderance of the evidence that they no longer meet SVP criteria. The same evaluative framework that supported commitment — contested diagnosis, risk assessment instruments — governs release. Independent evaluators are critical but costly. Petitions fail regularly.
Conditional Release (CONREP) — Not Freedom	WIC § 6608; WIC § 6609	Conditional release under CONREP is not equivalent to release. CONREP placements are subject to DSH and CONREP supervision, GPS monitoring, regular check-ins, movement restrictions, and conditions that can result in revocation and return to DSH-Coalinga without a new criminal conviction. Revocation requires only that the

		person violated a CONREP condition — not that they committed a new offense.
Community Notification Before Any Placement	WIC § 6609.1	Before any conditional release placement can be implemented, law enforcement, elected officials, and community members in the proposed placement area must be formally notified. This triggers organized community opposition in virtually every proposed placement. The notification requirement has effectively prevented placement for years in many cases — the commitment continues while the state and community fight over placement.

THE OPERATIONAL REALITY: CONDITIONAL RELEASE IS FREQUENTLY DELAYED BY YEARS

Community notification under WIC § 6609.1 combined with the absence of adequate CONREP placement infrastructure means that clients who are found suitable for conditional release routinely remain confined at DSH-Coalinga for additional years while placements are sought and litigated. Courts have found these delays constitutionally problematic (see *People v. Superior Court* (*Karsai*) (2013) 213 Cal.App.4th 774), but the delays continue. A client who 'wins' conditional release may not actually leave the facility for a long time afterward.

II. SVP-Specific Registration Obligations — Beyond Standard Requirements

General sex offender registration requirements under PC § 290 apply to all registrants. The following obligations are specifically triggered by or uniquely demanding for SVP-committed persons and differ materially from the general registration regime:

Obligation	Authority	SVP-Specific Distinction
Quarterly In-Person Registration for Life	PC § 290.012(b)	SVPs must appear in person at local law enforcement every 90 days — not the annual registration that applies to most registrants. Each missed appearance, even by one day, is a separate felony punishable by 16 months to 3 years in state prison. This

		quarterly burden continues for life with no mechanism for relief.
Permanent Ineligibility for Registry Relief	PC § 290.5; SB 384 (2021)	The tiered registry reform enacted by SB 384 created a petition pathway for Tier 1 and Tier 2 registrants to seek removal from the registry after specified periods. SVPs are classified as Tier 3 and are categorically excluded from this pathway. There is no minimum period after which an SVP may petition for registry removal — it is a lifetime obligation with no off-ramp.
Mandatory Carry of Registration Receipt	PC § 290.019	SVPs must carry their registration receipt on their person at all times and produce it on demand by law enforcement. Failure to carry or produce is a criminal violation. This is not a standard requirement for all registrants.
Permanent Megan's Law Public Listing	PC § 290.46	SVPs are listed on the publicly accessible Megan's Law website (meganslaw.ca.gov) with name, photograph, home address, physical description, and offense history. This listing is permanent, publicly searchable by anyone, and directly tied to the SVP designation — not simply to the underlying conviction.

III. GPS Monitoring and CONREP Supervision — SVP-Specific Conditions

Persons on conditional release as SVPs are subject to a supervision regime that has no parallel in standard parole or probation. These are consequences that flow directly from SVP commitment, not from the underlying conviction.

Condition	Authority	Description
GPS Monitoring for Life	PC § 3004; WIC § 6608.5	All SVPs released on conditional release are required to wear a GPS monitoring device as a mandatory condition. This is not discretionary. The device tracks the person's location at all times and is monitored by CONREP supervisors. The

		monitoring is permanent unless and until unconditional discharge is granted — which requires a separate court proceeding.
CONREP Supervision Conditions	WIC § 6608; PC § 3008	CONREP conditions imposed on SVPs are substantially more restrictive than standard parole. They routinely include: prohibition on unsupervised contact with any person under 18; prohibition on residing within specified distances of schools, parks, or child-care facilities; prohibition on access to the internet or social media; mandatory participation in outpatient sex offender treatment; polygraph examinations as a supervision tool; and restrictions on employment, travel, and associations.
Revocation Without New Criminal Conviction	WIC § 6608(h)	CONREP may be revoked and the person returned to DSH-Coalinga without a new criminal conviction. A violation of any CONREP condition — including a missed appointment, an unauthorized contact, or a detected lie on a polygraph — is sufficient. The standard for revocation is not the criminal 'beyond a reasonable doubt' standard. This means conditional release is always precarious regardless of actual reoffense risk.
Computer and Internet Monitoring	WIC § 6608; CONREP conditions	CONREP conditions for SVPs routinely require installation of monitoring software on any device the person uses, allowing supervisors to review all internet activity. Social media access is commonly prohibited entirely. These restrictions apply for the entire duration of conditional release.
Polygraph Examinations	CONREP standard conditions	SVPs on conditional release are routinely required to submit to polygraph examinations as a condition of supervision. Results are shared with CONREP supervisors and, depending on the condition, with law enforcement. A failed or inconclusive polygraph can trigger enhanced supervision or revocation proceedings, even absent independent evidence of misconduct.

IV. Housing — The Practical Barrier to Release

The combination of SVP-specific restrictions and the community notification requirement creates housing consequences that are functionally distinct from those faced by non-SVP sex offenders. The housing problem is the single greatest practical barrier to community reintegration for SVPs, and it is the reason so many conditional release orders result in years of continued confinement:

Restriction	Authority	SVP-Specific Impact
Community Notification Blocking Placements	WIC § 6609.1	Before any CONREP placement, residents, elected officials, and law enforcement in the proposed area must be notified. In practice, this notification triggers organized opposition that has prevented placements from being implemented even after courts have ordered release. The notification requirement applies only to SVPs — not to parolees or non-SVP sex offenders on supervision.
No Two-Offender Cohabitation	PC § 3003(g)	No two registered sex offenders may reside together unless related by blood, marriage, or adoption. For SVPs seeking CONREP placement, this restriction, combined with the limited pool of approved housing, substantially narrows available options in most regions.
Permanent Federal Housing Bar	42 U.S.C. §§ 13663, 13664; 24 C.F.R. § 960.204	Any person subject to a lifetime sex offender registration requirement — which includes all SVPs — is permanently and mandatorily barred from federally assisted public housing (Section 8 and HUD-assisted units). This prohibition cannot be waived by the housing authority. The housing options most accessible to low-income individuals are categorically unavailable.
CONREP Placement Infrastructure Shortage	WIC § 6608; ongoing statewide	DSH is required to establish and maintain sufficient CONREP placement capacity, but in practice placements are chronically scarce. Courts have repeatedly found that inadequate placement infrastructure constitutes unlawful continued confinement of persons found suitable for release. The

		client's commitment may continue not because they pose a danger but because there is nowhere to place them.

V. Employment Consequences — SVP-Specific Disqualifications

The Megan's Law public listing that is permanent for SVPs means that any employer conducting a standard background search will immediately identify the SVP designation. Beyond the practical barrier this creates, specific statutory disqualifications apply:

Area	Authority	Consequence
Education Employment — Automatic Bar	Ed. Code §§ 44010, 45122.1	SVPs are categorically prohibited from employment in California schools or school districts. Any teaching credential is automatically revoked upon SVP commitment. These bars flow from the underlying sex offense conviction and SVP determination.
Healthcare Licensing	Bus. & Prof. Code §§ 480, 490	SVP commitment is grounds for denial, suspension, or revocation of virtually all state-issued professional healthcare licenses — nursing, medicine, psychology, social work, counseling, pharmacy. The licensing boards treat SVP status as a per se disqualifier in most cases.
Federal Employment	5 U.S.C. §§ 7313, 7371	Federal employment is effectively foreclosed. Sex offenders are barred from federal civil service positions, and the SVP designation triggers background check disqualifications across virtually all federal agencies.
Military Service	10 U.S.C. § 504	Sex offenders are ineligible to enlist or be commissioned in any branch of the United States armed forces.
Positions Involving Minors	PC § 11105.3; various	Employers seeking background checks for positions with supervisory authority over minors may obtain the SVP designation. This disqualifies the person from youth-serving organizations, camps, sports

		programs, tutoring, and any other position with minor access — permanently.

VI. Civil Rights and Legal Status Consequences

Right / Status	Authority	SVP-Specific Consequence
Firearms — Lifetime Prohibition	PC § 29800; 18 U.S.C. § 922(g)(1)	The underlying felony conviction that led to SVP proceedings carries a lifetime firearms prohibition under both state and federal law. Possession of a firearm, ammunition, or dangerous weapon is a criminal offense. This prohibition is a consequence of the qualifying conviction, made permanent by the SVP commitment structure.
Public Housing — Permanent Federal Bar	42 U.S.C. §§ 13663, 13664	Persons required to register as sex offenders for life — all SVPs — are permanently barred from federally assisted housing. This is mandatory and may not be waived by the housing authority.
Immigration — Mandatory Deportation Risk	8 U.S.C. § 1227(a)(2)(A); Adam Walsh Act	Non-citizen SVPs face mandatory deportation following conviction for aggravated felony sexual abuse. SVP commitment may independently trigger additional immigration consequences. Non-citizen clients must be advised of these consequences before any waiver.
Voting Rights — Suspended During Confinement	Cal. Const. art. II, § 4	Voting rights are suspended during criminal imprisonment and during civil commitment as an SVP. Under current California law, restored upon final release — but the years of continued confinement eliminate the practical ability to vote for the duration of commitment.
Bankruptcy — Non-Dischargeable Fines	11 U.S.C. § 523(a)(7)	Restitution and fine obligations arising from sex offenses are non-dischargeable in bankruptcy proceedings. SVP-related civil commitment costs and any restitution obligations persist through any bankruptcy filing.

VII. International Travel — SVP-Specific Notification Obligations

All persons required to register as sex offenders for life — which includes all SVPs — are subject to mandatory advance notification of international travel under International Megan's Law (Public Law 114-119, enacted February 8, 2016):

Obligation	Authority	Description
Advance Travel Notification	International Megan's Law (P.L. 114-119); 34 U.S.C. § 20914(b)	SVPs must notify their registration jurisdiction in advance of any international travel, providing destination, dates, flight information, and itinerary. The registration jurisdiction notifies the U.S. Marshals Service, which notifies the destination country through INTERPOL. Failure to provide advance notice is a federal criminal offense.
Passport Identifier	P.L. 114-119 § 4; 22 U.S.C. § 212b	SVPs whose underlying conviction involved a minor are required to obtain a passport that includes a unique identifier notation indicating that the bearer is a registered sex offender. This identifier is visible to any foreign immigration or border authority examining the passport and may result in denied entry to many countries.
Destination Country Notification	P.L. 114-119; INTERPOL notification protocols	The U.S. government notifies destination countries through INTERPOL of the travel of SVPs. Many countries have policies of denying entry to registered sex offenders. An SVP may legally plan and pay for travel only to find they are denied entry at the border of the destination country.

VIII. The Social Reality of the SVP Designation

Beyond the formal statutory consequences catalogued above, the SVP designation carries a social reality that no statute can fully enumerate. The following are SVP-specific social consequences that counsel must convey to any client contemplating a waiver:

WHAT AN SVP DESIGNATION MEANS IN PRACTICE

Permanent Public Identification. Name, photograph, home address, physical description, and offense history are posted on the publicly accessible Megan's Law website (www.meganslaw.ca.gov), permanently and searchably. Anyone — employers, landlords, neighbors, family members of a potential intimate partner, internet users — can find this information with a simple name search.

Community Opposition at Every Placement Attempt. The WIC § 6609.1 notification requirement that applies only to SVPs means that every proposed CONREP placement triggers a public notification process. Community meetings, media coverage, and organized opposition routinely follow. Clients have been ordered released only to remain at DSH-Coalinga for years while placement attempts failed repeatedly due to community opposition.

Family Contact Restrictions. CONREP conditions routinely prohibit unsupervised contact with minors, which may include grandchildren, nieces, nephews, and children of current relationships. Court approval may be required for any supervised family contact. The family separation consequences of SVP commitment are often permanent in practical terms.

Continued Confinement Past Any 'Release' Order. Due to the community notification obstacle and CONREP placement shortage, a judicial or DSH finding of suitability for conditional release does not mean the client leaves the facility. Clients with valid release orders have remained confined for two to nine additional years while placements were sought. Courts have found this pattern constitutionally problematic but have not eliminated it.

SVP Status Follows Even After Release. Unlike a prison sentence that ends, an SVP commitment continues to govern the person's life through CONREP supervision, GPS monitoring, quarterly registration, mandatory treatment, and community restrictions for as long as supervision continues — which may be decades. Unconditional discharge requires a separate court proceeding and is rarely granted quickly.

COUNSEL'S OBLIGATION

A waiver of the probable cause hearing or commitment trial obtained without full advisement of these SVP-specific consequences is not a knowing and voluntary waiver. It is also the predicate for an ineffective assistance of counsel claim. Document every consequence counseling session in writing, obtain the client's acknowledgment in writing, and retain that documentation. These consequences are not hypothetical — they are the daily reality of every person committed under the SVPA.

F. Counsel's Obligations Before Entertaining Any Waiver

Before any discussion of waiving the probable cause hearing or the commitment trial can occur, counsel must satisfy a series of professional obligations. Failure to satisfy these obligations is itself evidence of ineffective assistance of counsel.

MANDATORY PRE-WAIVER CHECKLIST — PROBABLE CAUSE HEARING

- ✓ Obtained and reviewed all DSH evaluation reports and supporting materials in full
- ✓ Consulted with a qualified forensic psychologist regarding the strength of the state's case
- ✓ Identified specific methodological, diagnostic, or legal errors in the state's evaluations
- ✓ Retained an independent defense expert if any viable challenge exists
- ✓ Advised client in detail regarding the rights being waived and the consequences of commitment
- ✓ Advised client that the probable cause hearing is substantive, not a formality
- ✓ Documented advice given, client's questions, and client's decision in a signed writing
- ✓ Placed the waiver discussion on the record at the arraignment or next court date
- ✓ Advised client of full collateral consequences catalogued in Part E of this section

MANDATORY PRE-WAIVER CHECKLIST — COMMITMENT TRIAL

- ✓ Reviewed all evaluations for every category of error listed in Part C of this section
- ✓ Retained an independent defense expert for trial and disclosed the expert per court rules
- ✓ Researched all applicable trial defenses, including diagnostic invalidity, volitional impairment, and actuarial errors
- ✓ Advised client in writing of all available defenses and their factual bases
- ✓ Explained jury trial procedure and the reasonable doubt standard to the client
- ✓ Advised client of every lifelong collateral consequence of SVP commitment, citing specific statutes
- ✓ Made every effort, documented in writing, to counsel the client against waiving the trial
- ✓ If client insists on waiver, placed a full Faretta/waiver colloquy on the record before the court

- ✓ Obtained written waiver signed by client acknowledging all consequences explained by counsel

G. Cross-Examination Framework For The Probable Cause Hearing

If the attorney prepares for the probable cause hearing rather than waiving it, the cross-examination of the state's evaluators should follow a structured approach targeting the weakest points in each report. The following framework is organized by the principal areas of challenge discussed in this section and throughout this handbook.

Opening Questions: Establishing the Evaluator's Framework

1. 'Your opinion is that my client meets SVP criteria — meaning he has a diagnosed mental disorder, and that disorder currently causes him serious difficulty controlling sexually violent behavior. Is that correct?'
2. 'That standard comes from *Kansas v. Crane* and WIC section 6600. You understand the clinical opinion you expressed in your report must meet that legal standard?'
3. 'When you say it is likely he will engage in sexually violent behavior, are you using the word 'likely' to mean more probable than not, or something less?'
4. 'What specific definition of 'likely' are you using, and where does that definition come from?'

Diagnostic Challenge Sequence

1. 'Describe the specific diagnostic criteria under DSM-5 for [charged diagnosis], and walk me through how each criterion is met for my client.'
2. 'Does DSM-5 list [hebephilia / Paraphilia NOS nonconsent / Other Specified Paraphilic Disorder nonconsent] as a recognized diagnostic category?'
3. 'Are you aware that the DSM-5 committee rejected coercive paraphilia as a diagnosable condition, and the committee's reasoning?'
4. 'Did you review the client's ABEL Assessment or PPG results? What did they show?'
5. 'If the objective arousal assessment does not confirm deviant arousal to [the charged category], how does that affect your confidence in the diagnosis?'

Actuarial Challenge Sequence

1. 'Please explain each item you scored on the Static-99R and the basis for each scoring decision.'
2. 'You scored Item [X] as [Y] — can you point to the specific page in the Static-99R coding rules that supports that scoring?'
3. 'You used [routine norms / high-risk norms] — why that normative comparison group for this client?'
4. 'A Static-99R score in the well-above-average range tells us this person scores higher than comparison group members on static historical factors — correct? It does not mean he is more likely than not to reoffend — correct?'
5. 'What is the recidivism base rate for persons in the comparison group with my client's Static-99R score over a 5-year follow-up period?'

Current Disorder / Volitional Impairment Challenge

1. 'What specific behaviors, observable between now and the date of your evaluation, demonstrate that my client currently has serious difficulty controlling sexually violent behavior?'
2. 'You reviewed his Treatment Team reports from the last 12 months. Those reports note no incidents of sexual misconduct, no rule violations related to sexual behavior, and no expression of deviant interests. Is that correct?'
3. 'Given the absence of current behavioral indicators, what specific clinical evidence leads you to conclude the disorder is currently active rather than historically present?'

H. How To Counsel A Client Who Wants To Waive

Clients sometimes want to waive the probable cause hearing or trial for understandable but legally uninformed reasons: they are tired of the process, they believe the outcome is inevitable, they want to 'get it over with,' or they fear that fighting will make the proceedings worse. The attorney's job is not to override the client's ultimate decision — it is to ensure that decision is made with full information. The following framework is a guide to the client conversation.

Step 1: Establish What the Client Believes

Before attempting to persuade, understand. Ask the client why they want to waive. The answer will reveal which misconceptions need to be corrected. Common client beliefs that lead to waiver requests:

- 'My lawyer last time told me probable cause is just a formality and we'd lose anyway.' — Correct this directly: the probable cause hearing is a real, adversarial proceeding with a substantive legal standard, and it can be won.
- 'The doctor said I have [diagnosis] and there's nothing I can do about that.' — Correct this: the diagnosis is the starting point for the defense, not the endpoint. Diagnoses are contested with independent expert opinion.
- 'I'm going to get committed anyway, so I might as well not fight it.' — Challenge this: this prediction is based on no analysis of the specific case. The attorney has not yet reviewed the evaluations for error, retained an expert, or assessed the state's evidence.
- 'Fighting will make the judge mad.' — This is legally unfounded. The right to demand a hearing and trial is protected by statute and by the Constitution. Exercising that right cannot be used against the client.

Step 2: Explain the Consequences

Walk the client through every consequence catalogued in Part E of this section. Do not summarize — go through them one by one. Emphasize:

- Quarterly registration for the rest of his life, in person, at the police station.
- Permanent public listing on Megan's Law with photograph and address.
- Federal registration obligations that apply every time he crosses a state line.
- Permanent bar from public and federally assisted housing.
- Effective bar from most licensed professions and many fields of employment.
- CONREP conditions that may be more restrictive than prison — GPS monitoring, internet monitoring, mandatory treatment, no contact with potential victims.
- The impossibility of reversing a commitment once the trial has been waived — there is no undo button.

Step 3: Explain the Defense

After establishing consequences, explain specifically — not generally — what defenses are available in this case. Do not say 'we have some arguments.' Say: 'The evaluator scored your Static-99R incorrectly on Item 5 — the coding rules do not support that score, and with the correct score your risk level drops. Our expert will testify to that. In addition, the diagnosis of [X] has never been confirmed by objective testing — the ABEL and PPG assessments show no evidence of deviant arousal. Our expert will explain to the jury why a diagnosis based on offense history alone, without objective confirmation, does not meet DSM-5 criteria.' This is the level of specificity required for informed consent.

Step 4: Document the Conversation

Every client meeting at which the probable cause hearing or trial waiver is discussed must be followed by a memo to the file, dated, with the attorney's signature, summarizing: (1) what was explained; (2) what the client said; (3) whether the client agreed to proceed or insisted on a waiver; and (4) if the client insisted, that counsel recommended against the waiver. If the client insists on proceeding with a waiver after being fully informed, counsel must place the waiver on the record before the court, with the court's participation in confirming the waiver is knowing, intelligent, and voluntary.

I. Key Case Law Reference — Probable Cause, Trial, And IAC

Strickland v. Washington (1984) 466 U.S. 668 — Two-part test for IAC: (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability the outcome would have been different absent the deficiency. Both prongs are frequently met when a probable cause hearing is waived without investigation.

People v. Ledesma (1987) 43 Cal.3d 171 — California's formulation of the *Strickland* standard. Prejudice is established if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Kansas v. Crane (2002) 534 U.S. 407 — Due process requires proof that the SVP respondent has serious difficulty controlling behavior — not merely a propensity to reoffend. This constitutional floor must be established at trial; cross-examination should target whether the evaluator's opinion actually satisfies *Crane's* requirement.

Kansas v. Hendricks (1997) 521 U.S. 346 — SVP civil commitment is constitutional, but the predicate mental disorder must distinguish the person from other dangerous persons and must create serious difficulty controlling behavior.

People v. Superior Court (Ghilotti) (2002) 27 Cal.4th 888 — An evaluator who applies an incorrect legal standard for what constitutes 'likely to engage in sexually violent criminal behavior' commits material legal error. Courts may reject such opinions. The standard is not 'possible' or 'cannot be excluded.'

People v. Smith (Smith I) (2013) 216 Cal.App.4th 947 — A petition raising a diagnostic validity challenge is not frivolous and must proceed to hearing. Probable cause hearings are substantive, adversarial proceedings — not formalities. The

DSM committee rejected Paraphilia NOS nonconsent as a diagnosable condition five times before DSM-5 publication.

People v. Smith (Smith II) (2022) 75 Cal.App.5th 332 — Continued authority for the proposition that diagnosis challenges are viable at every stage of SVP proceedings. Evaluators applying contested and methodologically invalid diagnoses provide opinions that courts may and should scrutinize.

People v. Poulsom (2013) 220 Cal.App.4th 151 — Addressed standards for evaluating the reliability of expert diagnoses in SVP proceedings. The defense is entitled to challenge the scientific basis of the state's evaluation methodology.

People v. McKee (2010) 47 Cal.4th 1172 — Clarified equal protection standards applicable to SVP commitments and confirmed the client's right to appointed counsel and experts throughout SVP proceedings.

In re Ronje (2020) 53 Cal.App.5th 647 — Addressed IAC standards in SVP proceedings. Confirmed that SVP respondents are entitled to effective assistance of counsel at every stage, including probable cause hearings and commitment trials.

People v. Superior Court (Cheek) 87 Cal.App.5th 373 — Addressed procedural aspects of SVP hearings that affect how challenges are preserved. Issues not raised at the probable cause hearing or trial may be forfeited — another reason waiver is strategically harmful.

J. Closing: The Attorney's Obligation — Fight Every Stage

The SVP defense attorney's job is not to manage expectations. It is not to explain to the client why the government will probably win. It is to fight — at every procedural stage, with every available legal and factual argument, for a client who faces indefinite civil confinement and the most severe collateral consequences that California and federal law impose on any individual. The probable cause hearing is not a formality. The commitment trial is not a foregone conclusion. The evaluator's report is not gospel. And a waiver — of anything — without full information and documented client consent is an abdication of the most fundamental duty the attorney owes.

Every waiver that goes undocumented, every evaluation that goes unchallenged, every cross-examination that is not prepared, is a day of the client's liberty that cannot be recovered. The attorney who prepares — who reads the actuarial manuals, retains a qualified forensic expert, and studies the diagnostic literature — will find errors that others missed. Those errors are the difference between a client who fights and wins, and a client who waives and lives with the consequences for the rest of their life.

SECTION 9: REPRESENTATION AFTER PROBABLE CAUSE

Securing a client's rights at the probable cause hearing is not the end of representation — it is the beginning of an ongoing advocacy relationship that continues for as long as the client remains at Coalinga State Hospital. The period between probable cause and commitment trial, and between each annual review cycle, is not dead time. It is where treatment progress is built, documented, and protected. It is where systemic failures that could set back a client's case by months or years are identified and corrected. And it is where an engaged attorney — armed with firsthand knowledge of the client's actual institutional experience — gains the ammunition needed to file effective continuance motions, prepare section 6608 petitions, and challenge evaluators who have ignored what the treatment record actually shows.

This section is a practical field guide to attorney representation inside Coalinga State Hospital: how to attend Treatment Team Conferences, what to look for, what to demand, what institutional failures to document, and how to use email advocacy to fix problems that DSH administration will not fix on its own.

A. The Quarterly Treatment Team Conference

Every 90 days, each patient at Coalinga State Hospital appears before his unit's Treatment Team for a Treatment Team Conference. This is not a courtesy meeting — it is a structured institutional review mandated under DSH's own regulations and directly relevant to the client's legal proceedings. The conference is where the Treatment Team collectively discusses the client's progress over the prior quarter, his behavior on the unit, his participation in groups and programming, and any clinical concerns. The output of these conferences feeds directly into the annual evaluation reports and Treatment Team Reports (TTRs) that evaluators rely on when forming their opinions about conditional release suitability.

An attorney who attends Treatment Team Conferences — even by telephone — has a direct window into facts that would otherwise be filtered through the evaluator's perspective: how the client is actually doing, what the team genuinely thinks, what concerns exist, and what positive progress has occurred but might not be emphasized in the evaluation. That firsthand knowledge is invaluable for trial preparation, continuance motions, and section 6608 petition timing.

Attending by Telephone — The ROI Process

An attorney may attend Treatment Team Conferences remotely by telephone. To do so, the client must complete a Release of Information (ROI) form specifically listing the attorney's contact information. The process is straightforward but must be completed before the attorney can participate:

1. Client completes the ROI form at Coalinga, designating the attorney as a named recipient of treatment information and authorizing the attorney's participation in Treatment Team Conferences.
1. The ROI is submitted to the client's Case Manager or Social Worker on the unit.
2. The unit staff adds the attorney's phone number to the conference scheduling system.
3. At each quarterly conference, unit staff will call the attorney's listed phone number at the scheduled conference time.
4. The attorney participates by phone in the live conference.

PRACTICE NOTE: OBTAIN THE ROI AT YOUR FIRST VISIT

Do not wait for the client to raise the ROI. At your first in-person visit to Coalinga after taking the case, bring a blank ROI form or ask unit staff for one, and complete it with the client before you leave. Confirm with the Case Manager that the form has been received and that your phone number is in the scheduling system. Follow up by email to the unit's administrative address to confirm your participation status. Many attorneys miss multiple quarterly conferences simply because the ROI was never formalized — and those are conferences where treatment problems began and went undocumented.

B. The Complete Treatment Team — Who Must Attend

A complete Treatment Team Conference at Coalinga is not complete with just a subset of staff. The full team consists of six functional roles, each contributing distinct clinical and administrative perspectives on the client's progress. The attorney must know who is supposed to be at the table — and must demand completeness when the team is short-staffed.

Team Member	Primary Role at Conference	Required	Attorney Notes
Unit Psychologist	Clinical oversight; diagnosis; risk assessment input; documentation of psychological status and treatment progress	Yes	The psychologist's observations at the conference can be quoted or referenced in continuance

	toward addressing Dynamic Risk Factors.		motions and section 6608 petitions. If absent, demand rescheduling or supervisor substitution.
Social Worker (Licensed)	Social functioning assessment; community reintegration planning; collateral contacts; housing and family support documentation.	Yes	Licensure matters — an unlicensed social worker cannot provide the same level of credentialed clinical input. Note license status if filling in.
Rehabilitation Therapist	Programming participation; vocational and recreational group involvement; daily functioning assessment.	Yes	Group attendance records and the therapist's observations are relevant to showing consistent treatment engagement.
Case Manager	Administrative coordination; inter-agency communication; advancement tracking; document management.	Yes	The Case Manager is often the first to know about module advancement staffing, assessment schedules, and facilitator changes.
Nurse / Nursing Staff	Medical status; medication compliance; physical health concerns; behavioral observations from daily unit contact.	Yes	Nurses have the most frequent daily contact with the patient — their observations on behavioral stability and compliance are concrete evidence of DRF status.
Unit Supervisor	Administrative authority over unit operations; can approve staffing substitutions; oversees compliance with conference requirements.	Supervis or may fill	If a professional team member is absent, the Unit Supervisor may be directed by counsel to fill in. The supervisor has authority to address most conference functions.

DEMAND A COMPLETE TEAM — EVERY TIME

DSH administration treats Treatment Team Conferences as internal administrative events, not as the client's procedural rights. If the team is not complete when the conference begins, the attorney must immediately raise this on the call and state for the record: 'The conference record should reflect that [position] is not present. I am requesting that this conference be rescheduled to a date when a complete team is available, or that the Unit Supervisor substitute for the absent position.' This objection, stated in real time and followed by an email to the unit administrator the same day, creates a record that can be used to challenge the adequacy of DSH's

treatment oversight.

What Is Supposed to Happen Before the Conference

DSH's own policies and the institutional design of the Treatment Team Conference contemplate a meaningful preparatory process before the patient walks in. Each team member is supposed to individually meet with the patient in the weeks preceding the quarterly conference, review the prior 90 days of records and observations, and arrive at the conference prepared to discuss the patient's status from their own professional perspective. The conference is supposed to synthesize those individual assessments into a collective review.

This does not happen consistently at Coalinga. In practice, many team members have not individually met with the patient before the conference. Some arrive without having reviewed the prior 90 days of records at all. The conference then becomes a brief, superficial meeting — sometimes lasting less than five minutes — in which the team asks the patient a few generic questions and moves on. This is not what the regulations contemplate, and it directly harms the client because inadequate pre-conference preparation produces inadequate documentation of treatment progress.

WARNING: THE TWO-MINUTE CONFERENCE IS AN INSTITUTIONAL FAILURE

If a Treatment Team Conference concludes in two minutes or less, it has not fulfilled its purpose. A proper conference requires each team member to have reviewed the prior 90 days and to discuss findings individually. When a conference is cursory, the attorney should state on the call: 'I note that this conference appears to have been very brief. Before we conclude, I would like to hear from each team member about their individual observations of [client name] during the prior 90 days.' If team members cannot provide individualized observations because they have not done the preparatory work, that fact must go in the attorney's file as evidence of DSH's failure to provide adequate treatment oversight.

C. Attorney Conduct At The Treatment Team Conference

The attorney's role at the Treatment Team Conference is not passive. The attorney is not merely listening in for informational purposes — the attorney is the client's advocate in a setting where institutional pressures can suppress honest communication and gloss over meaningful progress. The attorney must be prepared to ask questions, push back

on vague or inaccurate characterizations, and make demands on the record when the team's conduct is deficient.

What to Listen For

- Whether each team member actually has current, specific information about the client's past 90 days — or is speaking in generalities.
- The specific groups the client has attended, the attendance record, and any facilitator's observations about the client's participation quality.
- Whether the client has been staffed for module advancement within the SOTP, or if advancement has been delayed — and the specific reason given for any delay.
- Whether any assessment (polygraph, PPG/plethysmograph) has been scheduled, refused, or is being used as a gating requirement for advancement without institutional authorization.
- The status of Dynamic Risk Factors identified in prior evaluations — whether team members can point to specific behavioral evidence that DRFs are improving, stable, or worsening.
- Any disciplinary incident during the quarter — whether it was documented, classified, and whether it is being weighted accurately or disproportionately.
- Whether the client's facilitator has recently changed — and if so, whether the new facilitator has been asked to 'start over' with the client's work.

Questions to Ask on the Call

1. To the Psychologist: 'What specific psychological observations from the past 90 days support your assessment of [client name]'s current status? Were there any behavioral incidents, and how were they evaluated in terms of Dynamic Risk Factors?'
5. To the Social Worker: 'Has the client had any contact with family or community support resources this quarter? What is the current plan for eventual community reintegration?'
6. To the Rehabilitation Therapist: 'What groups has the client attended, who facilitated those groups, and what is your qualitative assessment of the client's engagement?'
7. To the Case Manager: 'Has a staffing for advancement been scheduled or considered for this quarter? If not, what specific criteria remain outstanding, and who made that determination?'
8. To the Nurse: 'Were there any medical concerns, medication changes, or behavioral observations from daily contact during this quarter?'
9. If team is incomplete: 'For the record, [position] is not present at this conference. I am noting this objection and will follow up in writing. In the meantime, can the Unit

Supervisor address the responsibilities of the absent team member for the purposes of today's record?'

Using the Conference to Build the Legal Record

Everything the attorney hears at the Treatment Team Conference is potential evidence. After each conference, the attorney must:

1. Prepare a conference summary memo immediately — the same day if possible — recording who was present, what was said by each team member, any questions raised by the attorney, and any action items identified.
10. Compare the conference summary to the Treatment Team Report (TTR) that will eventually be generated. If the TTR omits positive observations made at the conference, or mischaracterizes the team's statements, challenge the TTR by letter to DSH.
11. Identify any issues revealed at the conference — incomplete team, assessments improperly required, facilitator changes — and send the email that same week. (See Part F.)
12. File a continuance motion if the conference reveals treatment factors that were not adequately weighted in the most recent annual evaluation. The firsthand knowledge from the conference is superior to second-hand review of records alone.

D. The SOTP Facilitator Problem — Credentials, Rotation, And Setbacks

The Sex Offender Treatment Program (SOTP) at Coalinga is the primary structured treatment modality for SVP patients. Its groups are the evidence base for treatment progress — but only if those groups are properly facilitated by credentialed professionals whose testimony would be meaningful in court. The reality at Coalinga is that the hospital chronically operates with approximately 30% of the facilitators it actually needs. This staffing crisis has produced two persistent and serious problems that attorneys must know, document, and aggressively address.

Problem 1: Unlicensed or Uncredentialed Facilitators in SOTP Module II

California's regulations governing sex offender treatment programming within state hospital facilities contemplate that SOTP groups — particularly Module II groups — be facilitated by licensed clinical professionals: a licensed psychologist, a licensed clinical social worker (LCSW), or an equivalent licensed mental health clinician. The reason is straightforward: licensed clinicians can be qualified as expert witnesses in court

proceedings, their clinical observations carry the weight of professional training and accountability, and their assessments are defensible under cross-examination.

In practice, many Module II groups at Coalinga are facilitated not by licensed clinicians, but by:

- Unlicensed social workers (associates or trainees who have not completed licensure requirements)
- Behavioral specialists (a classification that does not carry the same clinical credentials as a licensed clinician)
- Rehabilitation therapists (whose scope of practice does not include the clinical assessment functions central to SOTP group facilitation)

CRITICAL: AN UNCREDENTIALED FACILITATOR CANNOT EFFECTIVELY TESTIFY AT TRIAL

If a client's treatment progress in SOTP is documented by a facilitator who is not a licensed clinician, the value of that documentation is substantially reduced for legal proceedings. When the attorney calls the treating facilitator as a witness at a section 6608 hearing or commitment trial, the prosecution will impeach the facilitator's credentials. A behavioral specialist or unlicensed social worker may be disqualified as an expert witness or limited to fact testimony — providing a far less powerful account of the client's treatment progress than a licensed psychologist or LCSW would provide. The attorney must demand that the client be placed in a group with a licensed facilitator before this becomes an issue in court.

Problem 2: Facilitator Rotation — The 'Start Over' Setback

Because Coalinga operates with severe facilitator shortages, the hospital regularly rotates facilitators between groups — sometimes every few months. When a new facilitator takes over an existing group, the group members frequently face a demand, explicit or implicit, to 'start over' by re-presenting and re-demonstrating work they have already completed. Some new facilitators state this explicitly: 'I don't know you, so I need to see your work again.' Others do it more subtly by declining to credit prior session work or by not recommending advancement until they have personally observed sufficient sessions.

The practical consequence is devastating. A client who was six sessions away from completion of a Module II workbook is suddenly treated as if they began the module over again. Months or years of documented treatment work are functionally erased. And because the facilitator rotation happens repeatedly — sometimes every three to four months — a client can spend years cycling through Module II with no credit carrying

forward, while annual evaluators document 'failure to progress' as evidence supporting continued commitment.

SYSTEMIC FAILURE: FACILITATOR ROTATION IS CAUSING TREATMENT REGRESSION

This is not an individual problem — it is a systemic institutional failure at Coalinga. When approximately 70% of needed facilitator positions are unfilled, the hospital compensates by rotating existing staff among multiple groups. Each rotation resets the therapeutic relationship and, in practice, often resets the client's treatment credit. The attorney must document every facilitator change, the date of the change, the name of the new facilitator, and any statement made by the new facilitator about re-presenting work. This documentation is the foundation of a future challenge to any annual evaluation that relies on 'slow treatment progress' as evidence against the client.

Attorney Action: Demand a Licensed Facilitator in Writing

When the attorney learns at a Treatment Team Conference — or through the client — that a group is being facilitated by an unlicensed or uncredentialed person, the response is immediate email to unit administration. The email should:

- Identify the specific group the client is enrolled in and the current facilitator's name and title.
- State clearly that the current facilitator does not meet the credentialing standards applicable to SOTP group facilitation.
- Request in writing that the client be transferred to a group with a licensed psychologist or LCSW as facilitator, or that a licensed clinician be assigned to the current group.
- Set a response deadline — five business days is appropriate.
- Copy the client's case manager, the unit supervisor, and DSH's legal or administrative office as appropriate.
- Retain a copy of the email and any response in the client's file.

The same framework applies to facilitator rotation issues. When a new facilitator is assigned and signals that prior work will not be credited:

- Email the unit administrator and case manager immediately.
- Request confirmation that prior session work and progress documentation will be transferred to the new facilitator and credited.

- Request that the new facilitator be provided with the client's complete treatment file before the next group session.
- Request that any advancement determination by the new facilitator be made on the basis of the complete treatment record — not solely on personal observation of the new facilitator.
- If the response is inadequate, escalate to DSH Legal or the Patient Rights Advocate.

E. Assessment Policies — Polygraph And PPG/Plethysmograph

Coalinga State Hospital administers two primary objective assessments to patients in SOTP: the polygraph examination and the Penile Plethysmograph (PPG). These assessments are sometimes also referred to collectively with the ABEL Assessment for Sexual Interest (AASI-3) as the battery of objective measures used to evaluate arousal patterns and treatment disclosure.

The Hospital's Official Policy: Assessments Are Not Mandatory for Non-Committed Patients

As of the time of this writing, Coalinga State Hospital's official policy is that patients who have not yet been committed as SVPs are not required to take the polygraph or PPG assessments as a condition of treatment advancement. The policy reflects an important legal reality: an uncommitted patient has not been adjudicated to be an SVP and retains constitutional protections, including the privilege against self-incrimination, that may be implicated by compelled polygraph participation.

Under this policy, a patient who declines the assessments should still be able to advance through SOTP modules based on other measures of treatment participation, group attendance, workbook completion, and facilitator assessment. Advancement should not be gated by assessment completion for this population.

KEY POINT: NON-COMMITTED PATIENTS CANNOT BE REQUIRED TO PASS ASSESSMENTS TO ADVANCE

If a facilitator or psychologist is conditioning a non-committed patient's module advancement on completing and passing the polygraph or PPG, that facilitator or psychologist is acting inconsistently with DSH's official policy. The attorney must intervene immediately by email, citing the hospital's own stated policy, and demanding that the advancement decision be made on the basis of criteria that do not include mandatory assessment completion.

The Gap Between Policy and Practice

Despite the official policy, a significant number of facilitators and psychologists at Coalinga continue to require assessment completion and passage as a condition of advancement — in direct contradiction of DSH's stated policy. This occurs for several reasons:

- Individual staff members are not adequately trained on the policy or disagree with it and apply their own standard instead.
- DSH administration does not enforce its own policy consistently across units or among individual evaluators.
- The culture within some units treats assessments as de facto prerequisites even when the official policy says otherwise.
- Evaluators who use assessment results as evidence in annual reports create an implicit pressure on facilitators to require assessments, even for non-committed patients.

The consequence for the client is that they may be held back from advancing — and from the treatment progress that feeds into favorable annual evaluations and section 6608 petitions — because of an unauthorized gating requirement that DSH does not enforce. An attorney who knows this pattern is occurring can fix it quickly, usually within a matter of days, with a pointed email to the right administrator.

PRACTICE NOTE: ASK DIRECTLY AT EVERY CONFERENCE

At every Treatment Team Conference, ask the Case Manager and Unit Psychologist directly: 'Has any facilitator conditioned [client]'s module advancement on completing the polygraph or PPG assessment?' If the answer is yes, and if the client has not been committed, send the email that day. The issue is almost always resolved promptly once administration knows that the attorney is aware of the unofficial gating requirement and is prepared to document it as a policy violation.

F. The Problem Matrix — Common Institutional Failures And Email Remedies

The issues described in this section are systemic. They recur across units, across patient populations, and across time. The attorney who knows these issues will encounter them with virtually every client at Coalinga. The following matrix catalogues the most common institutional failures, their root causes, their impact on the client's

legal case, and the email advocacy remedy that has been successfully used to address them.

Issue	Root Cause	Impact on Client	Attorney Remedy
Incomplete Treatment Team at conference	Chronic unit understaffing; no accountability for attendance	Conference record is incomplete; missing professional observations; inadequate documentation	State objection on the call; email same day to unit admin; request rescheduling or supervisor substitution
Two-minute conferences with no individual prep	Administration treats conferences as compliance checkboxes, not substantive reviews	No meaningful treatment progress documentation; evaluators rely on vague records	Ask individual questions to each team member; if answers are vague, document in writing that prep work was not done
Uncredentialed facilitator in SOTP Module II	Severe facilitator shortage (approx. 30% of needed positions filled)	Treatment documentation is not credible for court; facilitator cannot effectively testify	Email demanding transfer to licensed-facilitator group or assignment of licensed clinician; set 5-day deadline
Facilitator rotation and 'start over' demands	Hospital rotates staff among groups every few months due to shortages	Treatment credit lost; advancement delayed months or years; evaluators document 'slow progress'	Email demanding credit for prior work; request new facilitator receive complete treatment file; document any refusal
Assessment required for advancement (non-committed patient)	Individual staff non-compliance with hospital policy; no enforcement by administration	Advancement blocked; treatment stalled; evaluator cites 'failure to advance' without noting improper gating	Email citing DSH official policy; demand advancement decision on proper criteria; escalate to DSH Legal if ignored
Client not placed in any SOTP group	Waitlists; facilitator shortage; administrative error	No treatment progress to document; evaluators cite lack of programming as evidence of unchanged disorder	Email demanding immediate group placement; request written explanation for delay; cite WIC § 6606 treatment

			obligation
Module advancement staffing not scheduled	Facilitator or psychologist informally delaying without stated criteria	Client stalls in module for months past completion; evaluations show 'incomplete SOTP'	Email asking for specific outstanding criteria for advancement; demand staffing date within 30 days; document any non-response
Treatment Team Report (TTR) mischaracterizes conference statements	TTRs drafted from memory or from sparse notes; positive statements minimized	Annual evaluator reads misleading TTR; favorable observations not reflected in evaluation	Compare conference summary memo to TTR; email requesting correction of specific inaccuracies; attach conference summary

G. Email Advocacy — Technique And Templates

Email is the attorney's most effective tool for institutional advocacy at Coalinga. Unlike a phone call, email creates a contemporaneous written record. Unlike a letter, email produces a response — or a documented non-response — within a short time window. And unlike a court filing, email can often resolve an issue in days rather than months. The pattern that has been repeatedly successful is: (1) send a specific, professional email identifying the problem; (2) state the policy or legal basis that requires resolution; (3) request a specific action with a specific deadline; and (4) copy appropriate supervisors. Administration responds to email pressure because it creates a paper trail they cannot ignore.

Elements of an Effective Advocacy Email

- Opening identification: 'I am the attorney of record for [client name], patient ID [number], currently housed on [unit]. I am writing regarding the following matter.'
- Specific factual description: describe exactly what happened, when, and who was involved. No vague complaints — specific facts only.
- Policy or legal basis: cite the DSH policy, WIC section, or constitutional provision that the conduct violates. This signals that the attorney is informed and the issue is not going away.

- Specific requested action: what exactly should be done, by whom, and by when.
- Consequences of non-response: 'If I have not received a response by [date], I will escalate this matter to [DSH Legal / Patient Rights Advocate / the committing court].'
- Professional close: keep the tone firm but professional. The goal is resolution, not escalation — though the attorney must be prepared to escalate if necessary.

Template 1: Incomplete Treatment Team Conference

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TO: Unit Supervisor, [Unit]; Unit Administrator, [Unit]; Case Manager,
[Client Name]
SUBJECT: Treatment Team Conference — Incomplete Team / [Client Name] /
[Unit]
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I am the attorney of record for [Client Name], patient ID [XXXXX],
currently housed on [Unit] at Coalinga State Hospital.

I participated by telephone in [Client Name]'s quarterly Treatment Team
Conference on [Date]. During that conference, [Position / Name] was absent
from the team.

A complete Treatment Team is required to conduct a meaningful conference
consistent with DSH policies governing patient treatment review. The
absence of [Position] means that the conference record does not include
[that professional's] clinical assessment of [Client Name]'s progress
during the past 90 days.

I am requesting the following:
1. That a rescheduled conference be held within 14 days with a complete
team present; OR
2. That the Unit Supervisor provide, in writing, the clinical assessment
that would have been provided by [Position], based on a review of [Client
Name]'s records for the past 90 days.

I am also requesting written confirmation that today's incomplete
conference has been noted in [Client Name]'s file.

If I have not received a response by [Date + 5 business days], I will raise
this matter at the next court hearing as evidence that DSH has failed to
provide adequate treatment review.

Respectfully,
[Attorney Name]
[Bar Number]
[Firm / Contact Information]
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Template 2: Uncredentialed Facilitator in SOTP Group

TO: Unit Supervisor, [Unit]; Unit Psychologist, [Unit]; Case Manager, [Client Name]
SUBJECT: SOTP Group Facilitation — Credential Concern / [Client Name] / [Unit]

I am the attorney of record for [Client Name], patient ID [XXXXX], at Coalinga State Hospital, [Unit].

I have been informed that [Client Name]'s current SOTP [Module II / describe group] group is facilitated by [Facilitator Name], whose title is [title — e.g., Behavioral Specialist / Unlicensed Social Worker Associate].

SOTP group facilitation, particularly for Module II programming, requires a licensed clinical professional whose qualifications would permit them to provide credentialed testimony regarding the patient's treatment progress if called as a witness in legal proceedings. The current facilitator does not meet this standard.

This is significant because treatment documentation produced by an uncredentialed facilitator carries substantially reduced evidentiary weight in court proceedings, and may impair [Client Name]'s ability to demonstrate meaningful treatment progress in future hearings.

I am requesting that:
1. [Client Name] be reassigned to an SOTP group facilitated by a licensed psychologist or licensed clinical social worker; OR
2. A licensed clinician be co-assigned as primary facilitator for [Client Name]'s current group.

Please advise in writing of the action taken within five (5) business days.

Respectfully,
[Attorney Name]
[Bar Number]
[Firm / Contact Information]

Template 3: Facilitator Rotation / Start-Over Demand

TO: Unit Supervisor, [Unit]; Case Manager, [Client Name]; Unit Psychologist, [Unit]
SUBJECT: Treatment Credit / Facilitator Change / [Client Name] / [Unit]

I am the attorney of record for [Client Name], patient ID [XXXXX], at Coalinga State Hospital, [Unit].

I have been informed that [Client Name]'s SOTP group facilitator recently changed from [Prior Facilitator] to [New Facilitator]. I am further informed that [New Facilitator] has indicated that [Client Name] will need to re-present or re-demonstrate work that was already completed and documented under [Prior Facilitator].

This is unacceptable. [Client Name] has documented treatment history in this module spanning [time period], and any re-presentation requirement that does not credit prior completed work represents a treatment setback not attributable to [Client Name]'s conduct or lack of progress.

I am requesting:
1. That [New Facilitator] be provided with [Client Name]'s complete treatment file from prior sessions, including all workbook submissions, group participation records, and facilitator notes.
2. Written confirmation that [Client Name]'s advancement determination will be based on the complete treatment record, not solely on [New Facilitator]'s personal observations since assuming this group.
3. A meeting (by telephone) between myself, [New Facilitator], and the Unit Psychologist within 30 days to ensure continuity of treatment credit.

Please respond within five (5) business days.

Respectfully,
[Attorney Name]
[Bar Number]
[Firm / Contact Information]

Template 4: Improper Assessment Gating for Non-Committed Patient

TO: Unit Supervisor, [Unit]; Unit Psychologist, [Unit]; DSH Legal [if prior attempts failed]
SUBJECT: SOTP Advancement — Assessment Requirement Policy / [Client Name] / [Unit]

I am the attorney of record for [Client Name], patient ID [XXXXX], at Coalinga State Hospital, [Unit].

I have been informed that [Client Name]'s advancement in SOTP has been conditioned on completion and passage of the [polygraph / PPG] assessment. [Client Name] has not been committed as a Sexually Violent Predator and is

currently in pre-commitment status.

It is my understanding that Coalinga State Hospital's current policy does not require non-committed patients to complete or pass psychological assessments as a condition of SOTP module advancement. Please confirm DSH's policy in writing.

If I am correct that this is not a required condition, I am requesting:
1. That [Client Name]'s advancement determination be made on the basis of proper SOTP criteria — group attendance, workbook completion, facilitator assessment, and behavioral record — without the assessment requirement.
2. That written notice be provided to [Client Name]'s treatment team confirming that assessment completion is not a gating condition for his advancement.
3. That advancement be scheduled or reviewed within 30 days of this notice.

If DSH's policy has changed and assessments are now mandatory even for non-committed patients, please provide the written policy document reflecting that change.

Respectfully,
[Attorney Name]
[Bar Number]
[Firm / Contact Information]

Template 5: Module Advancement Not Scheduled / Unexplained Delay

TO: Unit Psychologist, [Unit]; Unit Supervisor, [Unit]; Case Manager, [Client Name]
SUBJECT: Module Advancement — Staffing Request / [Client Name] / [Unit]

I am the attorney of record for [Client Name], patient ID [XXXXX], at Coalinga State Hospital, [Unit].

Based on my review of [Client Name]'s treatment records and discussions during his most recent Treatment Team Conference on [Date], [Client Name] has completed the requirements for [Module II / describe module] and is ready for advancement staffing.

As of today, no staffing date has been scheduled. No written criteria identifying outstanding requirements have been provided to [Client Name] or to me.

I am requesting:
1. A written explanation of any specific criteria that remain unmet for

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advancement purposes.
2. If no outstanding criteria exist: a staffing date for [Client Name]'s
module advancement to be scheduled within 30 days.

Please note that unexplained delays in advancement directly affect [Client
Name]'s legal proceedings. Annual evaluations and section 6608 hearings
depend on accurate documentation of treatment progress. If advancement is
being informally delayed without stated criteria, that delay will be raised
before the committing court.

Please respond within five (5) business days.

Respectfully,
[Attorney Name]
[Bar Number]
[Firm / Contact Information]
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H. When Email Is Not Enough — Escalation Pathways

Email advocacy resolves most institutional problems at Coalinga within a matter of days to weeks. But DSH is a bureaucracy, and bureaucracies sometimes ignore correspondence — particularly from attorneys whose clients are not currently in active court proceedings. When email fails, the attorney must escalate through the following pathways:

Pathway 1: DSH Patient Rights Advocate

Every DSH facility is required to have a Patient Rights Advocate (PRA) whose function is to ensure that patients' rights are protected under California law, DSH regulations, and institutional policy. The PRA operates independently from the unit administration and has the authority to investigate patient complaints, review records, and compel a response from facility management. When email to the unit administrator and unit supervisor produces no result within five business days, the attorney should copy or separately contact the Patient Rights Advocate at Coalinga with a formal written complaint documenting the problem, the attorney's prior communications, and the lack of response.

Pathway 2: DSH Legal Affairs

DSH's Legal Affairs office is staffed by attorneys whose mandate includes ensuring that DSH complies with its own regulations and with court orders affecting patients. When

the problem is a systematic policy violation — particularly where DSH's own official policy is being flouted by individual staff members — the DSH Legal Affairs office is a more powerful escalation point than the unit administrator. The attorney should send a formal letter to DSH Legal identifying the policy at issue, the violation, the attorney's prior communications, and the consequences if DSH does not remedy the situation.

Pathway 3: The Committing Court

When institutional failures at Coalinga are affecting the client's ability to participate in treatment and thereby affecting their legal case, the attorney has the authority — and in some cases the obligation — to bring those failures to the attention of the committing court. A motion for treatment compliance or a declaration attached to a continuance motion, documenting the specific failures and their legal consequences, puts DSH in the position of either correcting the problem or explaining to a judge why they have not. Courts have inherent authority to oversee the treatment obligations imposed on DSH by WIC section 6606 and the SVPA's constitutional framework. The threat of judicial oversight is often more effective than any number of emails.

Pathway 4: Habeas Corpus

Where DSH's failures rise to the level of denying the client's constitutional rights — particularly the due process right to treatment that is the legal foundation for civil commitment — habeas corpus is the ultimate remedy. As discussed in earlier sections of this handbook, civil commitment is constitutional only so long as it is accompanied by meaningful treatment. A client who is confined at Coalinga but denied access to properly credentialed treatment groups, blocked from advancement by unauthorized gating requirements, and subjected to facilitator rotations that repeatedly reset their progress, has a potentially viable habeas claim that the commitment has become punitive rather than therapeutic.

I. Connecting Conference Knowledge To Legal Strategy

Everything the attorney learns at Treatment Team Conferences and through email advocacy has direct application to the client's legal proceedings. The attorney who attends every conference, documents what happens, and tracks the institutional failures is building a case file that no evaluator's annual report alone can replicate. Here is how that knowledge converts into legal strategy:

Continuance Motions

If the Treatment Team Conference reveals positive treatment development that is not yet reflected in the most recent annual evaluation — or if it reveals institutional failures that have impeded the client's progress — that is a basis for a continuance motion supported by the attorney's firsthand observations from the conference. A continuance motion that cites specific conference statements, by name and date, carries far more weight than one that relies only on general assertions about treatment progress. The conference summary memo becomes an exhibit.

Section 6608 Petition Timing

The decision of when to file a section 6608 petition — discussed in Section 7 of this handbook — depends on knowing the current state of the client's treatment. The attorney who attends conferences knows in real time when the client is approaching module advancement, when DRFs are showing improvement in behavioral terms, when age is making the actuarial picture more favorable, and when the team's own observations contradict the most recent evaluator's conclusions. That knowledge makes the petition timing decision one based on facts rather than guesswork.

Annual Evaluation Challenges

When the annual evaluator's report arrives, the attorney who has attended the prior four Treatment Team Conferences can compare the evaluator's characterization of the client's treatment progress against the conference record. If the evaluator has minimized positive observations, failed to account for treatment engagement that the team documented at conferences, or based conclusions on outdated information that the conference record contradicts, those discrepancies are the foundation of a Ghilotti motion or a motion to produce an independent evaluation.

Trial Preparation

When the case eventually proceeds to trial — or to a section 6608 hearing — the attorney who attended every conference is prepared to call treatment team members as witnesses, to cross-examine the state's evaluator with specific conference-sourced facts, and to present the jury or court with a treatment narrative that is grounded in documented, firsthand institutional observations rather than in the evaluator's single-point annual snapshot. This is the kind of trial preparation that makes a difference between a rubber-stamp commitment and a genuine contest.

J. Master Checklist — Ongoing Representation At Coalinga

INITIAL SETUP — DO THIS AT THE FIRST VISIT

- ✓ Complete ROI form with client listing attorney's phone number for Treatment Team Conference participation
- ✓ Confirm ROI submission with Case Manager in person
- ✓ Follow up by email to confirm participation status in the scheduling system
- ✓ Obtain copy of client's current SOTP module placement and facilitator information
- ✓ Request copy of most recent Treatment Team Report (TTR) and prior quarterly TTRs
- ✓ Request copy of client's current Dynamic Risk Factor (DRF) list from unit psychologist
- ✓ Confirm whether any advancement staffing has been scheduled or is pending
- ✓ Ask client directly: has any assessment been required as a condition of advancement?

EVERY QUARTERLY CONFERENCE — DO THIS EACH TIME

- ✓ Confirm dial-in details with Case Manager 48 hours before the conference
- ✓ Check whether all six team positions are represented at the start of the call
- ✓ If incomplete team: state objection on the call and request supervisor substitution or rescheduling
- ✓ Ask each team member individually what they observed in the prior 90 days
- ✓ Ask about group attendance, facilitator identity, and quality of client's participation
- ✓ Ask about advancement staffing — scheduled, pending, or delayed — and reason if delayed
- ✓ Ask about any assessment requirements for advancement
- ✓ Take real-time notes on all statements made by each team member
- ✓ Draft conference summary memo the same day
- ✓ Send any required advocacy email within 72 hours of the conference
- ✓ File conference memo in the client's permanent file

WHEN PROBLEMS ARISE — RESPOND IMMEDIATELY

- ✓ Draft the advocacy email the same day the problem is identified

- ✓ State the specific problem, the policy basis, the requested action, and the deadline
- ✓ Copy unit supervisor, case manager, and any relevant administrator
- ✓ Set a 5-business-day response deadline in the email
- ✓ If no response in 5 days: escalate to Patient Rights Advocate or DSH Legal
- ✓ If institutional-level failure: prepare motion for committing court with supporting documentation
- ✓ If rights violation: assess habeas corpus viability under WIC § 6606

CONNECT CONFERENCE KNOWLEDGE TO LEGAL PROCEEDINGS

- ✓ Compare each conference summary to the TTR generated for that quarter — note discrepancies
- ✓ When annual evaluation arrives: compare to conference summaries from all four prior quarters
- ✓ If evaluation minimizes or contradicts conference-documented progress: send rebuttal letter to DSH
- ✓ Use conference knowledge to identify optimal timing for section 6608 petition filing
- ✓ Use conference knowledge to file continuance motions with firsthand supporting detail
- ✓ Prepare conference-attending team members as potential witnesses for hearing or trial
- ✓ Retain conference summary memos as exhibits for section 6608 hearings and trial

---

The attorney who shows up only for court hearings — and disappears in the months between — is not representing an SVP client. They are managing appearances. Real representation after probable cause means attending conferences, documenting problems, sending the email, demanding the complete team, fighting the facilitator rotation, and turning every quarterly conference into a building block of the legal case. The hospital counts on attorney absence. It is structured for attorney absence — the two-minute conference, the incomplete team, the vague TTR — all of it functions on the assumption that no one is watching. The attorney who watches, documents, and advocates changes that assumption. And the client whose attorney changes that assumption has a measurably better legal case.

APPENDIX A – Sample Ghilotti Motion

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	Case No.:
Petitioner,	)	NOTICE OF MOTION AND MOTION
	)	TO STRIKE EVALUATION FOR
v.	)	MATERIAL LEGAL ERROR UNDER
	)	PEOPLE V. SUPERIOR COURT
[PATIENT],	)	(GHILOTTI)
	)	
Respondent.	)	Date: _____
_____	)	Time: _____
		Dept: _____

TO THE CLERK OF THE ORANGE COUNTY SUPERIOR COURT, AND TO THE DISTRICT ATTORNEY FOR THE COUNTY OF ORANGE:

PLEASE TAKE NOTICE that on the date and time listed above or as soon thereafter as the matter may be heard in the above-entitled court, Respondent [PATIENT] will move this court for an order striking the evaluation report of [EVALUATOR], Psy.D., dated _____, 2026 on the grounds that said evaluation contains material legal error(s) as defined in *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888.

The term "Ghilotti motion" is the proper name for the challenge(s) within. (See *Wright v. Superior Court* (2012) 204 Cal.App.4th 879.)

This motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of [PATIENT], all papers and pleadings on file in this action, and such other oral and documentary evidence as may be presented to the court at the hearing.

Dated: _____ Respectfully submitted,

_____

[PATIENT]

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Respondent [PATIENT] hereby moves this court under *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888 to strike the evaluation of [EVALUATOR], Psy.D., dated _____, 2026, on the grounds that said evaluation contains multiple material legal errors that undermine confidence in [EVALUATOR] ultimate conclusions.

[EVALUATOR] evaluation contains the following material legal errors:

DIAGNOSTIC ERRORS (Goes to Whether Statutory Requirements Met):

1. *Speculation About Prepubescent Status* - Diagnosed pedophilic disorder without assessing whether any victim was prepubescent, in violation of *People v. Wright* (2016) 4 Cal.App.5th 537.

2. *Including Post-Pubescent Victim* - Included 16-year-old (100% post-pubescent) in "prepubescent males" diagnosis.

3. *Failure to Conduct Differential Diagnosis* - Never considered hebephilia vs. pedophilia; hebephilia NOT a DSM disorder

EVIDENTIARY ERRORS (Violate CCR Title 9 & Case Law):

4. *Use of Dismissed, Uncharged Allegations* - Relied on 1994 allegations where NO charges were ever filed.

5. *Reliance on Stale Evidence* - Used 2-3 year old DPS reports as evidence of "current" status.

6. *Multiple CCR Title 9 Violations* - Violated §§4011, 4012, 4013, 4014.

SPECULATION ERRORS (*People v. Wright* Violations):

7. *Speculation About Masturbation* - Pure speculation about unobserved private behavior with zero evidence.

8. *Speculation About Legal Images* - Speculated legal, non-contraband images = "reinforcing deviant interests"

These errors are material because there is a reasonable probability, sufficient to undermine confidence in the outcome, that they affected [EVALUATOR] ultimate conclusion that [PATIENT] meets WIC §6600 criteria for continued commitment.

Most critically, if the correct diagnosis is hebephilia (not pedophilia), [PATIENT] does NOT have a "diagnosed mental disorder" under DSM-5-TR because hebephilia was explicitly rejected by the DSM-5 committee. This goes directly to whether WIC §6602(a) statutory requirements are satisfied.

LEGAL STANDARD

A. Judicial Review for Material Legal Error

In *Reilly v. Superior Court* (2013) 57 Cal.4th 641, the California Supreme Court held that at the request of either party, evaluators' recommendations are subject to judicial review. The court concluded that only if, after such review, it appears that the evaluators were influenced by a "material legal error," their recommendation is invalid.(See *Ghilotti*, *supra*, 27 Cal.4th at p. 895.)

Judicial review of expert evaluations under the Sexually Violent Predator Act (Welf. & Inst. Code, §6600, et seq.) is limited to whether one or more evaluator's reports are infected by material legal error.

An evaluator's report is infected with legal error if, on its face, it reflects an inaccurate understanding of the statutory criteria governing the evaluation. On the other hand, judicial review of an evaluator's report does not extend to matters of debatable professional judgment within an evaluator's expertise. The professional determination of

an evaluator, insofar as based on consideration and application of correct legal standards, is conclusive at the initial screening stage set forth in Welf. & Inst. Code §6601.

Where the issue is properly presented, the trial court should review a designated evaluator's report to determine whether, on its face, the report is infected with material legal error. If such legal error does not appear on the face of the report, the court must accept the report as valid. (*People v. Superior Court* (*Troyer*) (2015) 240 Cal.App.4th 654.)

B. Definition of "Legal Error"

The term "legal error" means a mistake about the law. (*Griffin v. United States* (1991) 502 U.S. 46, 59.)

Legal errors include:

- Misunderstanding statutory requirements (WIC §6602 criteria)
- Misapplying diagnostic criteria (DSM-5-TR requirements)
- Using evidence prohibited by law (dismissed, uncharged allegations)
- Failing to follow legally mandated procedures (CCR Title 9)
- Speculation prohibited by case law (*People v. Wright*)

C. When Error Is "Material"

Such an error is material if there appears a reasonable probability, sufficient to undermine confidence in the outcome, that the error affected the evaluator's ultimate conclusion. (*Ghilotti*, at p. 913.)

An evaluator's legal error must be deemed material if, and only if:

(1) There appears a reasonable probability, sufficient to undermine confidence in the outcome, that the error affected the evaluator's ultimate conclusion, and

(2) A change in the evaluator's conclusion would either supply, or dissolve, the necessary concurrence of two designated evaluators. (*People v. Superior Court* (*Troyer*) (2015) 240 Cal.App.4th 654.)

By requiring that assessment protocol errors must rise to the level of materiality, it is ensured that meritorious petitions can proceed, while mandating reevaluation, and possible dismissal, where their merit is in doubt. If the alleged SVP can demonstrate that a material error occurred in the evaluative process, for the purposes of Welf. & Inst. Code, §6601, both concurring evaluations are invalid and are rendered a legal nullity. New evaluations must therefore replace them, ensuring that an alleged SVP who has proved that material error occurred in the proceedings receives adequate protection under the SVPA. (*Reilly v. Superior Court* (2013) 57 Cal.4th 641.)

D. Prohibition on Speculation in SVP Evaluations

In *People v. Wright* (2016) 4 Cal.App.5th 537, a CERTIFIED FOR PUBLICATION opinion, the California Court of Appeal, Second District, reversed an SVP commitment based on an expert's speculation about victims' physical and sexual development.

1. The Wright Case Facts

John Wright was convicted of sex offenses against females ages 14, 14, 15, and 17. The People's expert, Dr. Michael Musacco, diagnosed Wright with "paraphilia not otherwise specified, hebephilia" - a diagnosis requiring victims be in pubescent stage of development (not prepubescent, not post-pubescent).

Critical Problem: Dr. Musacco had NO INFORMATION about the victims' actual physical or sexual development - only their ages.

Dr. Musacco admitted:

- "I don't know what they looked like"

- "I don't know where they were at [in sexual development]"
- Had to "hypothesize" and make "assumptions" about their development
- "If the 14-year-olds weren't pubescent, the diagnosis would be inaccurate"
- "If I knew their body type I could be firm in my opinion or I would retract my opinion"
- Rated diagnosis as "6" on scale of 1-10
- Called it "close case" and "debatable"

2. Wright Court's Holding

The Court of Appeal REVERSED the SVP commitment, holding:

"Dr. Musacco's opinion that Wright suffers from hebephilia was based, in principal part, on ASSUMED and HYPOTHESIZED facts about the 14-year-old and 15-year-old victims' physical and sexual development, and those assumed and hypothesized facts were NOT SUPPORTED by the record."

"Because Dr. Musacco's diagnosis was based on PURE SPECULATION AND CONJECTURE about the victims' physical and sexual development, it did NOT possess any evidentiary value."

"There is simply too great an ANALYTICAL GAP between the data and the opinion proffered." (Quoting *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771.)

3. Legal Principles from Wright

The Wright court established the following binding legal principles for SVP evaluations:

a. Expert Opinions Must Be Based on Evidence, Not Speculation

"When an expert bases his or her conclusion on factors that are 'speculative, remote or conjectural,' or on 'assumptions... not supported by the record,' the expert's opinion 'cannot rise to the dignity of substantial evidence' and a judgment based solely on that

opinion 'must be reversed for lack of substantial evidence.'" (*Wise v. DLA Piper LLP* (US) (2013) 220 Cal.App.4th 1180, 1191-1192.)

b. Assumptions Without Evidentiary Support Have No Value

"An expert's opinion based on assumptions of fact without evidentiary support, or on speculative or conjectural factors, has no evidentiary value and may be excluded from evidence." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.)

c. Hypothetical Possibilities Don't Assist Fact-Finder

"An expert opinion that something could be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury." (*Ibid*.)

d. Expert Opinion Has No Value if Basis is Unsound

"An expert opinion has no value if its basis is unsound... an expert opinion based on speculation or conjecture is inadmissible." (*Sargon*, *supra*, 55 Cal.4th at p. 770.)

e. Speculation Cannot Support Involuntary Commitment

"Speculation is not evidence and cannot support a conviction or, as here, an involuntary commitment." (*People v. Waidla* (2000) 22 Cal.4th 690, 735.)

f. No Speculation as to Probabilities

"A finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence." (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

4. *Wright's* Application to Paraphilia Diagnoses

Wright establishes that when a paraphilia diagnosis requires knowledge of victims' physical or sexual development (pubescent for hebephilia, prepubescent for pedophilia), the expert MUST have actual evidence of that developmental status.

Age alone is insufficient. Children develop at different ages, and expert cannot assume developmental status based solely on age.

Expert must assess or acknowledge limitation. If expert cannot determine developmental status, expert must either:

- Examine available evidence (police reports, court records, medical literature)
- Acknowledge inability to determine and explain impact on diagnosis
- Decline to diagnose due to insufficient information

Speculation filling evidentiary gap is prohibited. Expert cannot fill critical diagnostic gap with assumptions, hypotheses, or speculation.

E. Remedy for Material Legal Error

If legal material error is found, the remedy is stated to be: "The use of the invalid assessment protocol did not deprive the trial court of fundamental jurisdiction, and, therefore, dismissal outright before new evaluations could be conducted was not an appropriate remedy." (*Ronje*, *supra*, 179 Cal.App.4th at p. 518.)

"The remedy we expressly ordered in *Ronje* to cure the underlying error was new evaluations under section 6601 including, if required, evaluations conducted by two independent evaluators, not updated or replacement evaluations under section 6603, subdivision (c)." (*Ronje*, *supra* at p. 519.)

"The expiring words of the SVPA and *Ghilotti* require dismissal of the SVPA commitment petition if the new evaluations failed to produce the concurrence required

to support the filing of an SVPA commitment petition." (*Wright v. Superior Court* (2012) 204 Cal.App.4th 879.)

Alternatively, under *Ghilotti*: "If the court does find... 'material legal error in an evaluator's report, the court shall provide the evaluator opportunity promptly either to correct the report or to prepare a new report...'" (*Ghilotti*, *supra*, 27 Cal.4th at pp. 913-914.)

APPLICABLE STATUTORY AND REGULATORY FRAMEWORK

A. WIC §6602 Requirements

Welfare and Institutions Code section 6602 governs commitment of Sexually Violent Predators (SVPs). To continue an SVP commitment, the People must prove beyond a reasonable doubt that:

(a) The person has a severe mental disorder as defined in section 6600;
(b) The severe mental disorder is one of the mental disorders specified in the DSM referenced in section 6600;
(c) The severe mental disorder was a cause of or an aggravating factor in the commission of a crime for which the person was convicted;
(d) The disorder is not in remission or cannot be kept in remission without treatment; and
(e) By reason of the severe mental disorder, the person represents a substantial danger of physical harm to others.

CRITICAL: Subsection (b) requires a mental disorder "specified in the DSM." If the correct diagnosis is hebephilia rather than pedophilia, this requirement is NOT met because hebephilia was explicitly rejected by the DSM-5 committee and is NOT in DSM-5-TR.

B. CCR Title 9 - SVP Evaluation Standards

California Code of Regulations, Title 9, sections 4010-4014 establish standards for evaluations conducted by Department of State Hospitals evaluators and contractors. These regulations have the force of law and violations constitute legal error, not mere clinical disagreement.

§4010 - Purpose and Scope:

"The purpose of these regulations is to provide standards for evaluations conducted to determine whether an individual meets the definition of a sexually violent predator... or a mentally disordered offender..."

§4011 - Sources of Information:

"The psychologist shall:

(a) Use reliable sources of information.
(b) Verify information when possible.
(c) Distinguish between verified facts and allegations.
(d) Note and document limitations of information sources."

§4012 - Use of Hearsay:

"If hearsay is used as the basis for an opinion, the psychologist shall:

(a) Corroborate the hearsay whenever possible.
(b) Not rely solely on hearsay for critical conclusions."

§4013 - Clinical Judgment:

"The psychologist shall:

(a) Base opinions on adequate foundation.
(b) Consider alternative explanations for the information.
(c) Follow professional standards in conducting evaluations."

§4014 - Documentation:

"The psychologist shall:

(a) Clearly identify sources of information.
(b) Document methodology used.
(c) Acknowledge limitations of the evaluation."

C. DSM-5-TR Diagnostic Criteria

The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR) is the authoritative source for mental disorder diagnoses required by WIC §6602(b).

Pedophilic Disorder Diagnostic Criteria:

Criterion A (The Key Criterion):
"Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a PREPUBESCENT child or children (generally age 13 years or younger)."

Criterion B:
"The individual is at least age 16 years and at least 5 years older than the child or children in Criterion A."

Criterion C:
"The individual with pedophilic disorder is at least 16 years old."

CRITICAL DEFINITIONAL REQUIREMENT: The word "PREPUBESCENT" in Criterion A refers to a DEVELOPMENTAL STAGE (Tanner Stage 1), NOT merely an age.

Definition of Prepubescent:

- Before onset of puberty
- Tanner Stage 1 (no development of secondary sexual characteristics)

- Typically ends between ages 9-14 for boys
- Individual-specific, not age-defined

Medical Evidence on Male Pubertal Development:

According to Herman-Giddens et al. (2012), "Secondary Sexual Characteristics in Boys: Data from the Pediatric Research in Office Settings Network," Pediatrics, 130(5), e1058-e1068:

- Median age of Tanner Stage 2 onset: 10.14 years
- By age 11: 30-50% of boys have entered puberty
- By age 12: 60-80% of boys have entered puberty
- By age 13: 85-95% of boys have entered puberty
- By age 16: 100% of boys are post-pubescent

Once a boy enters Tanner Stage 2, he is NO LONGER prepubescent by medical and psychiatric definition.

Hebephilia (NOT a DSM Disorder):

Hebephilia refers to sexual attraction to PUBESCENT adolescents (Tanner Stages 2-3), typically ages 11-14.

The DSM-5 committee explicitly considered and REJECTED hebephilia for inclusion as a mental disorder due to:

- Insufficient evidence of clinical significance
- Concerns about forensic misuse
- Lack of clear boundaries
- Risk of pathologizing normal attraction

CRITICAL LEGAL CONSEQUENCE: If the pattern of offending involves pubescent (not prepubescent) victims, the diagnosis would be hebephilia, which is NOT a DSM disorder and does NOT satisfy WIC §6602(b).

D. DSH Training Requirements for SVP Evaluators

Evaluators contracted by the Department of State Hospitals to conduct SVP evaluations receive specific training from the DSH Chief Psychologist on:

- Legal framework governing SVP evaluations
- Proper application of DSM diagnostic criteria
- CCR Title 9 evaluation standards
- Prohibition on speculation established in case law (including *Wright*)
- Professional ethical standards

Evaluators are specifically trained that:

- They must understand and follow the legal framework
- Speculation is prohibited
- *Wright* principles must be followed
- CCR Title 9 compliance is mandatory, not optional

[EVALUATOR], as a contracted SVP evaluator, received this training and was aware of these requirements.

MATERIAL LEGAL ERROR #1: SPECULATION ABOUT PREPUBESCENT STATUS (*PEOPLE V. WRIGHT* VIOLATION)

A. The Legal Error

[EVALUATOR] diagnosed [PATIENT] with pedophilic disorder based on PURE SPECULATION that victims were prepubescent, without examining any evidence of their actual developmental status.

This is a direct violation of *People v. Wright* (2016) 4 Cal.App.5th 537, which reversed an SVP commitment for this exact type of speculation.

B. The Facts Establishing the Error

1. [EVALUATOR] Diagnosis (Report pp. 10-11)

[EVALUATOR] diagnosed: "F65.4 Pedophilic Disorder, sexually attracted to both, non-exclusive type"

[EVALUATOR] stated (Report p. 11): "He continued to commit sex offenses against PREPUBESCENT MALES."

2. What DSM-5-TR Requires

DSM-5-TR Criterion A explicitly requires: "sexual activity with a PREPUBESCENT child or children"

This is not an age requirement - it is a DEVELOPMENTAL STAGE requirement.

3. Evidence [EVALUATOR] Examined Regarding Prepubescent Status: ZERO

[EVALUATOR] report contains ZERO evidence regarding actual pubertal/developmental status:

✗ No physical descriptions of victims from police reports
✗ No court transcripts describing victims' appearance
✗ No medical examination records
✗ No assessment of Tanner staging
✗ No evaluation of secondary sexual characteristics
✗ No photographs of victims
✗ No consultation of medical literature on pubertal probabilities
✗ NOTHING

4. What [EVALUATOR] Actually Relied On: Ages Only

The ONLY information [EVALUATOR] had:

- Victim ages: 16, 12, 11, 11 (Report p. 3)

[EVALUATOR] ASSUMED prepubescent status based solely on age, without any evidence of actual developmental status.

5. Additional Factual Error

[EVALUATOR] incorrectly listed "DOE 1" age 11 as a victim (Report p. 3). There was no victim named DOE 1. This demonstrates carelessness in reviewing basic case information, further undermining confidence in the evaluation.

Actual victims:
- DOE 2, age 16 (2001 conviction)
- DOE 3, age 11 (2001 conviction)
- DOE 4, age 12 (2006 conviction)
- One 11-year-old boy (1998 juvenile adjudication)

6. Medical Evidence [EVALUATOR] Ignored

Based on Herman-Giddens et al. (2012):

Victim	Age	Prepubescent Probability	Pubescent/Post-Pubescent
DOE 2	16	0%	100% (post-pubescent)
DOE 4	12	20-40%	60-80% (likely pubescent)
DOE 3	11	50-70%	30-50% (poss. Pubescent)
1998	11	50-70%	30-50% (poss. Pubescent)

Result: Of 4 victims, approximately 2-3 were MORE LIKELY pubescent or post-pubescent than prepubescent.

C. Why This Is a Wright Violation

[EVALUATOR] methodology is IDENTICAL to the speculation condemned in Wright:

***WRIGHT* CASE:**
- Expert had victims' ages only (14, 14, 15, 17)
- No evidence of physical/sexual development
- Expert "hypothesized" and made "assumptions"

- Court held: "Too great an analytical gap" - speculation invalid

[PATIENT] / [EVALUATOR] CASE:
- Expert had victims' ages only (16, 12, 11, 11)
- No evidence of physical/sexual development
- Expert assumed prepubescent without evidence
- Same "analytical gap" between data and opinion

Critical Evidentiary Gap: Were victims actually prepubescent?

What [EVALUATOR] Should Have Done:
- Review police reports with physical descriptions (if available)
- Review court transcripts with victim testimony (if available)
- Consider medical literature on pubertal development
- Assess probability based on ages and medical data
- Acknowledge limitation if unable to determine
- Conduct differential diagnosis (pedophilia vs. hebephilia)

What [EVALUATOR] Actually Did:
- Saw ages under 13
- ASSUMED prepubescent
- Diagnosed pedophilia
- Never acknowledged speculation or limitation

This is textbook *Wright* speculation: filling critical diagnostic gap with assumption unsupported by evidence.

D. Why [EVALUATOR] Error Is WORSE Than Wright

[EVALUATOR] error is actually MORE EGREGIOUS than Dr. Musacco's in Wright:

1. Dr. Musacco at least ADMITTED his speculation
- Acknowledged he was "hypothesizing"
- Admitted diagnosis was "debatable"
- Said would "retract" if body type known
- Rated case 6/10

[EVALUATOR] made NO such admissions

- Never acknowledged limitation
- Presented a diagnosis with false certainty
- No disclaimer about speculation

2. [EVALUATOR] assumptions contradict medical probability

- Wright: 14-15 year olds could be pubescent (possible)
- [PATIENT]: 11-12 year olds MORE LIKELY pubescent than prepubescent

3. [EVALUATOR] included obviously post-pubescent victim

- Wright: 17-year-old at least acknowledged as not fitting
- [PATIENT]: 16-year-old used as evidence of "prepubescent males"

4. [EVALUATOR] was specifically trained on *Wright*

- SVP evaluators trained by DSH on legal framework
- Training specifically covers prohibition on speculation
- [EVALUATOR] should have known better

E. Why This Error Is Material

1. Goes to Core Diagnostic Criterion

Prepubescent status is not peripheral - it is THE DEFINING criterion for pedophilic disorder. Without prepubescent victims, there is NO pedophilic disorder.

2. Contradicts Medical Science

[EVALUATOR] assumption that all victims under 13 were prepubescent directly CONTRADICTS medical evidence showing boys 11-13 are commonly pubescent.

3. Prevents Proper Differential Diagnosis

By assuming prepubescent without evidence, [EVALUATOR] avoided considering hebephilia as alternative diagnosis - critical because hebephilia is NOT a DSM disorder.

4. Goes to Statutory Requirements

If victims were actually pubescent → pattern is hebephilia → hebephilia NOT in DSM → [PATIENT] does NOT meet WIC §6602(b) requirement.

This diagnostic error goes DIRECTLY to whether statutory requirements for commitment are satisfied.

5. Reasonable Probability of Effect on Conclusion

If [EVALUATOR] had:
- Examined evidence of developmental status
- Considered medical probabilities
- Acknowledged victims likely pubescent
- Conducted differential diagnosis
- Concluded hebephilia rather than pedophilia

He would have found [PATIENT] does NOT have a DSM disorder and does NOT meet WIC §6602 criteria.

There is MORE than reasonable probability - there is HIGH probability - that this error affected [EVALUATOR] ultimate conclusion.

MATERIAL LEGAL ERROR #2: INCLUDING POST-PUBESCENT 16-YEAR-OLD IN "PREPUBESCENT" DIAGNOSIS

A. The Legal Error

[EVALUATOR] included 16-year-old DOE 2 as evidence supporting a diagnosis requiring PREPUBESCENT victims.

By age 16, 100% of males are POST-PUBESCENT (Tanner Stages 4-5) with fully developed adult male secondary sexual characteristics and body proportions.

This is not a matter of speculation or probability - it is MEDICAL CERTAINTY that a 16-year-old male is NOT prepubescent.

B. The Facts

[EVALUATOR] Report (p. 3):
Lists "two counts of PC 288a(b)(1) against 16-year-old DOE 2"

[EVALUATOR] Report (p. 11):
States [PATIENT] "continued to commit sex offenses against PREPUBESCENT MALES"

Context makes clear this includes 16-year-old DOE 2.

C. Why This Is Material Legal Error

1. Medical Impossibility

A 16-year-old male is post-pubescent by definition. Including him in a "prepubescent" diagnosis is like diagnosing someone with hypothermia when their temperature is 98.6°F - it's medically impossible.

2. Demonstrates Fundamental Incompetence

This error demonstrates fundamental lack of competence in sexological assessment and understanding of developmental stages.

Equivalent errors would be:
- Diagnosing pedophilia based on attraction to 18-year-olds
- Diagnosing hypothermia in person with normal temperature
- Diagnosing pregnancy in male patient

3. Suggests Pattern May Be Hebephilia or Normal

Including a post-pubescent 16-year-old suggests the pattern of attraction is NOT to prepubescent characteristics but rather to:

- Pubescent characteristics (hebephilia), or
- Post-pubescent adolescent characteristics (ephebophilia), or
- Young adult characteristics (normal)

None of these is pedophilia.

4. Undermines Entire Diagnosis

If [EVALUATOR] doesn't understand that 16-year-olds are post-pubescent, how can the court have confidence he understands prepubescent vs. pubescent developmental stages at all?

D. Materiality

This error ALONE creates reasonable doubt about the diagnosis because:

- If pattern includes post-pubescent attraction, it's definitionally NOT pedophilia
- Strongly suggests hebephilia or normal attraction range
- Goes to whether diagnosis correct
- Goes to whether WIC §6602 requirements met

MATERIAL LEGAL ERROR #3: FAILURE TO CONDUCT DIFFERENTIAL DIAGNOSIS CCR §4013 VIOLATION)

A. The Legal Error

[EVALUATOR] failed to conduct differential diagnosis between pedophilia and hebephilia.

This violates:

- CCR Title 9, §4013 (must "consider alternative explanations")

- Basic professional standards for forensic psychological assessment
- Training received from DSH on evaluation methodology

B. What Is Hebephilia

Hebephilia: Sexual attraction to PUBESCENT adolescents (Tanner Stages 2-3), typically ages 11-14.

CRITICAL LEGAL FACT: Hebephilia is NOT recognized as a mental disorder in DSM-5-TR. The DSM-5 committee explicitly considered and REJECTED hebephilia.

C. Why Differential Diagnosis Was Required

Given the following facts:
- Victim ages: 16, 12, 11, 11
- Medical evidence: ages 11-13 commonly pubescent (30-80%)
- No evidence anyone was actually prepubescent
- 16-year-old definitely post-pubescent

Professional standards REQUIRE considering hebephilia as alternative diagnosis and explaining why it was ruled out.

This is not optional. Differential diagnosis is a BASIC professional standard in forensic assessment.

D. [EVALUATOR] Report Contains

✗ NO discussion of hebephilia
✗ NO differential diagnosis
✗ NO analysis of why hebephilia was ruled out
✗ NO acknowledgement DSM-5 rejected hebephilia
✗ NO consideration of alternative explanations

E. Why This Is Material Legal Error

1. Violates CCR Title 9, §4013

§4013 mandates: "The psychologist shall... consider alternative explanations for the information."

Hebephilia is the OBVIOUS alternative explanation for the victim age pattern (11-16). Failure to consider it violates this regulation.

CCR Title 9 has force of law. Violations are legal errors, not clinical judgment calls.

2. Goes to Statutory Requirements

The reason differential diagnosis matters legally:

IF victims were prepubescent → pedophilia → DSM disorder → WIC §6602(b) MET

IF victims were pubescent → hebephilia → NOT DSM disorder → WIC §6602(b) NOT MET

This goes DIRECTLY to whether statutory requirements are satisfied.

3. Medical Probability Supports Hebephilia

Based on medical evidence:
- 16-year-old: 100% post-pubescent (doesn't fit pedophilia)
- 12-year-old: 60-80% pubescent
- 11-year-olds: 30-50% pubescent each

Statistical probability: 2-3 of 4 victims were NOT prepubescent.
Pattern MORE CONSISTENT with hebephilia than pedophilia.

4. Reasonable Probability of Different Conclusion

If [EVALUATOR] had conducted proper differential diagnosis:

Step 1: Consider prepubescent vs. pubescent evidence
Step 2: Assess probability based on medical literature

Step 3: Conclude 3 likely pubescent, one post-pubescent
Step 4: Pattern more consistent with hebephilia
Step 5: Hebephilia NOT in DSM
Step 6: [PATIENT] does NOT meet WIC §6602(b)
Step 7: Recommend against continued commitment

There is reasonable probability - indeed, HIGH probability - that proper differential diagnosis would have led to different conclusion.

F. The Hebephilia Issue Goes to Heart of Case

This is not an academic distinction. Whether the diagnosis is pedophilia or hebephilia determines WHETHER STATUTORY REQUIREMENTS ARE MET.

- Pedophilia = DSM disorder = can support commitment
- Hebephilia = NOT DSM disorder = CANNOT support commitment

By failing to conduct differential diagnosis, [EVALUATOR] avoided the analysis that may have revealed [PATIENT] does NOT qualify for continued commitment under WIC §6602.

MATERIAL LEGAL ERROR #4: USE OF DISMISSED, UNCHARGED ALLEGATIONS

A. The Legal Error

[EVALUATOR] relied on 30-year-old allegations from 1994 where NO CHARGES WERE EVER FILED to support his diagnosis.

This violates:

- CCR Title 9, §4011 (must "distinguish between verified facts and allegations")
- Basic principles of due process
- Limits on use of uncharged conduct

B. The 1994 Allegations (Report p. 7)

May 1994 - 8-Year-Old Girl ([CITY], CA):

[EVALUATOR] states: "There were credible reports of [PATIENT] molesting an 8-year-old girl when he was 13 years old in May 1994 in [CITY], CA."

Status: "This case was cleared by the Sheriff's Department due to lack of evidence."

October 1994 - 10-Year-Old Girl ([CITY], CA):

[EVALUATOR] states allegation of molesting 10-year-old girl.

Status: "The case was closed by the Sheriff's Department because the victim did not want to prosecute as long as [PATIENT] received help."

CRITICAL FACT: NEITHER case resulted in:
- Arrest
- Charges filed
- Prosecution
- Adjudication
- Any legal finding of wrongdoing

C. How [EVALUATOR] Used These Allegations

1. To Support "Sexually Attracted to Both" Diagnostic Specifier

ALL of [PATIENT]'s ADJUDICATED offenses involve MALES only:
- 2001: DOE 3 (male), DOE 2 (male)
- 2006: DOE 4 (male)
- 1998: 11-year-old boy

The ONLY alleged female victims are the 1994 cases where no charges were filed.

[EVALUATOR] based the "sexually attracted to both" specifier ENTIRELY on unproven, uncharged, 30-year-old allegations.

2. To Establish "Extensive History Since Age 13"

[EVALUATOR] uses 1994 allegations to claim offending began at age 13, suggesting longer and more extensive pattern.

D. Why This Is Material Legal Error

1. "Cleared Due to Lack of Evidence" ≠ "Credible"

[EVALUATOR] characterizes May 1994 as "credible reports" yet admits the case was "cleared by the Sheriff's Department due to lack of evidence."

These characterizations are contradictory and legally improper.

"Cleared for lack of evidence" means Sheriff found insufficient probable cause to support the allegation. This CANNOT be properly characterized as "credible."

2. No Charges Filed = Cannot Be Used as Proof

No charges were filed in either case. There was no:

- Preliminary hearing finding of probable cause
- Grand jury indictment
- Criminal trial
- Adjudication of any kind

Using uncharged allegations as substantive proof of conduct violates basic due process principles.

3. Violates CCR Title 9, §4011

§4011 requires evaluators to "distinguish between verified facts and allegations." [EVALUATOR] treats 30-year-old UNPROVEN allegations where NO CHARGES FILED as if they were VERIFIED FACTS by calling them "credible reports" and using them to support diagnostic conclusions.

This is legal error under CCR Title 9.

4. Only Basis for "Attracted to Both" Specifier

The "sexually attracted to both" specifier is based ENTIRELY on these unproven allegations.

If these allegations are removed (as they should be), the specifier has NO basis in adjudicated conduct.

ALL adjudicated offenses involve males only → specifier should be "sexually attracted to males" not "both."

E. Materiality

This error is material because:

1. Diagnostic Specifier May Change
Without 1994 allegations, specifier should be "attracted to males" not "both"

2. Pattern Assessment Changes
Without 1994 allegations, pattern is males only ages 11-16 (more consistent with hebephilia)

3. Demonstrates Unreliable Methodology
Using unproven, uncharged 30-year-old allegations demonstrates willingness to use unreliable evidence, undermining confidence in entire evaluation.

4. Reasonable Probability of Effect
If [EVALUATOR] had:
- Excluded unproven/uncharged allegations
- Based diagnosis only on adjudicated conduct
- Found pattern was males only
- Reconsidered diagnosis

There is reasonable probability this would have affected his conclusions.

MATERIAL LEGAL ERROR #5: RELIANCE ON STALE EVIDENCE (2-3 YEARS OLD)

A. The Legal Error

[EVALUATOR] relied on DPS (Department of Police Services) investigations from 2023-2024 (2-3 years before his December 2025 evaluation) and presented them as evidence of [PATIENT]'s "current" risk status.

This violates the requirement that WIC §6602 evaluations assess CURRENT status.

B. The Facts

DPS Investigation #1 - Communication with Prisoner

Time Frame: Approximately January – April of 2023 (2-3 years before December 2025 evaluation)

Allegation: [PATIENT] sent images/videos to inmate at California State Prison, Corcoran (CVSP)

Basis: Belief [PATIENT] had possession of a modified tablet or cell phone

Investigation Results:
- NO modified tablet found
- NO cell phone found
- NO devices of any kind found
- Images were "not illegal per PC 311.4" (Report p. 5)
- Images were "not contraband at CSH" (Report p. 5)

DPS Investigation #2 - Anonymous Tip

Time Frame: Approximately mid - 2024 (1-2 years before evaluation)

Source: Anonymous tip (source unknown, credibility unknown)

Allegation: "Trafficking" in child pornography

Investigation Results:
- No illegal material found
- No contraband found

C. How [EVALUATOR] Used This Stale Evidence

[EVALUATOR] Report (p. 11):

"[PATIENT]'s DPS reports over this review period indicate that he MAY BE CONTINUING TO REINFORCE his deviant sexual interests."

Problems:

1. Presented as Current Status
Language "may be continuing" suggests ongoing, current behavior when evidence is 2-3 years old.

2. Ignored What Actually Happened
- Investigation found NO DEVICES
- Allegation was based on assumption he had smuggled devices
- No devices = allegation was WRONG
- Yet [EVALUATOR] uses as if allegation was confirmed

3. Never Considered Alternative Explanation
[EVALUATOR] never considered obvious alternative: Someone OUTSIDE the hospital manages [PATIENT]'s online accounts or social media.

This would explain how images appeared in communications WITHOUT [PATIENT] having devices or sending anything himself.

CCR §4013 REQUIRES considering alternative explanations - [EVALUATOR] didn't.

4. Received Reports AFTER Interview

[EVALUATOR] received DPS reports AFTER completing his interview with [PATIENT] (Report pp. 5-6) - "just prior to when this report was due to be submitted"

[PATIENT] had NO OPPORTUNITY to:

- Explain someone outside manages his accounts
- Respond to allegations
- Provide context
- Explain that DPS never even interviewed him about these investigations, so he had no knowledge of them

D. Why This Is Material Legal Error

1. WIC §6602 Requires Assessment of CURRENT Status

WIC §6602(d): Disorder "is not in remission or cannot be kept in remission"

WIC §6602(e): Person "represents a substantial danger of physical harm"

Both require assessment of CURRENT status, not status 2-3 years ago.

2. 2-3 Years Is Stale for Current Status Assessment

Particularly when:

- [PATIENT] has been in continuous treatment
- He advanced to Module III (Community Reintegration) in intervening period
- Module III is FINAL treatment module those under WIC §6602, specifically prepares for the community
- Significant time has passed

Using 2-3 year old negative conclusions as evidence of CURRENT status when significant positive developments (Module III) occurred in interim is legal error.

3. Investigation Found NO Evidence of Wrongdoing

- Allegation assumed smuggled devices

- NO devices found
- Images were LEGAL
- Images were NOT contraband

Yet [EVALUATOR] characterizes as "continuing to reinforce deviant interests"

This is speculation about meaning of LEGAL, NON-CONTRABAND images from FAILED investigation.

4. Violates *Wright* Prohibition on Speculation

Wright prohibits speculation filling evidentiary gaps. Here:

Evidentiary Gap: What do 2-3 year old legal images mean about CURRENT status?

What [EVALUATOR] Did: Speculated they mean "continuing to reinforce deviant interests"

Problem: No evidence of this. No devices found. Alternative explanation not considered. Legal images don't inherently connect to deviance.

E. Materiality

This error is material because:

1. Goes to Current Status Requirement

Current dangerousness is statutory requirement - cannot be established with stale evidence.

2. Ignores Intervening Treatment Progress

Module III advancement is major positive development ignored in favor of 2-3 year old allegations.

3. Based on Failed Investigation

Investigation found NO devices, yet used as if suspicions confirmed.

4. Reasonable Probability of Effect

If [EVALUATOR] had:

- Recognized evidence was 2-3 years old
- Acknowledged investigation found nothing
- Considered alternative explanation (outside account manager)
- Given appropriate weight to Module III advancement
- Assessed CURRENT status properly

There is reasonable probability different conclusion about current risk.

MATERIAL LEGAL ERROR #6: VIOLATION OF CCR TITLE 9 SVP PROTOCOL

A. The Legal Error

[EVALUATOR] violated multiple requirements of CCR Title 9, which establishes legally binding standards for SVP evaluations.

These are not mere professional guidelines - they are REGULATIONS with force of law. Violations constitute legal error, not clinical judgment disagreements.

B. Training Requirement

SVP evaluators contracted by Department of State Hospitals receive specific training from DSH Chief Psychologist on:

- Legal framework for evaluations
- CCR Title 9 requirements
- Professional standards
- Prohibition on speculation (*Wright*)

[EVALUATOR] received this training and was aware these requirements are mandatory, not optional.

C. Specific CCR Title 9 Violations

VIOLATION #1: §4011(a) - Use Reliable Sources

Requirement: "The psychologist shall use reliable sources of information."

Violations:
- Anonymous tips (inherently unreliable - unknown source, unknown motive)
- 30-year-old uncharged allegations cleared for lack of evidence
- 2-3 year old stale DPS reports based on failed investigations
- Uncorroborated hearsay

Legal Error: Using unreliable sources violates §4011(a).

VIOLATION #2: §4011(c) - Distinguish Facts from Allegations

Requirement: "The psychologist shall distinguish between verified facts and allegations."

Violations:
- Called 1994 uncharged allegations "credible reports"
- Treated as verified when they were cleared/closed without charges
- Used as substantive evidence without noting unverified status
- DPS allegations treated as facts when investigations found nothing

Legal Error: Treating unverified allegations as facts violates §4011(c).

VIOLATION #3: §4012 - Hearsay Must Be Corroborated

Requirement: "If hearsay is used as the basis for an opinion, the psychologist shall corroborate the hearsay whenever possible and not rely solely on hearsay for critical conclusions."

Violations:
- DPS reports are hearsay (reports of what others said/observed)
- Anonymous tip is hearsay from unknown source
- 1994 allegations are 30-year-old hearsay
- NONE was corroborated

- Used as basis for critical conclusions

Legal Error: Using uncorroborated hearsay as basis for conclusions violates §4012.

VIOLATION #4: §4013(a) - Opinions Must Have Adequate Foundation

Requirement: "The psychologist shall base opinions on adequate foundation."

Violations:
- Prepubescent status opinion has NO foundation (ages only, no developmental assessment)
- "Continuing to reinforce" opinion based on 2-3 year old stale evidence
- "Credible reports" characterization has no identified foundation

Legal Error: Opinions without adequate foundation violate §4013(a).

VIOLATION #5: §4013(b) - Consider Alternative Explanations

Requirement: "The psychologist shall consider alternative explanations for the information."

Violations:

Alternative explanations NOT considered:
  - Victims may have been PUBESCENT (hebephilia vs. pedophilia)
- Someone outside hospital manages accounts (explains DPS images)
- 2-3 years old may not reflect current status
- Legal images have innocent explanations
- 1994 allegations were FALSE (hence cleared/closed)

Legal Error: Failing to consider obvious alternative explanations violates §4013(b).

VIOLATION #6: §4014(a) - Clearly Identify Sources

Requirement: "The psychologist shall clearly identify sources of information."

Violations:
- "Credible reports" source never identified
- Who said 1994 allegations were "credible"?

- On what basis characterized as credible?
- Source not identified in report

Legal Error: Failing to identify source of "credible" characterization violates §4014(a).

VIOLATION #7: §4014(c) - Acknowledge Limitations

Requirement: "The psychologist shall acknowledge limitations of the evaluation."

Violations:
- Never acknowledged inability to assess prepubescent status
- Never acknowledged speculation about development
- Never acknowledged 2-3 year old evidence may not reflect current status
- Never acknowledged alternative diagnoses possible
- Presented diagnosis with false certainty despite limitations

Legal Error: Failing to acknowledge obvious limitations violates §4014(c).

D. Cumulative CCR Title 9 Violations

[EVALUATOR] violated §§4011(a), 4011(c), 4012, 4013(a), 4013(b), 4014(a), and 4014(c).

These are not isolated errors - they represent SYSTEMATIC failure to follow legally mandated evaluation protocol.

E. Why These Are Material Legal Errors

1. CCR Title 9 Has Force of Law

These regulations are not mere professional guidelines. They are legally binding standards established by the State of California for SVP evaluations.

Violations are LEGAL errors (mistakes about the law), not clinical judgment disagreements.

2. Violations Permeate Entire Evaluation

These violations affect:
- Diagnosis (prepubescent speculation, no alternative explanations)
- Risk assessment (stale evidence, unreliable sources)
- Methodology (no adequate foundation, no acknowledgement of limitations)

3. Each Violation Undermines Confidence

Individually, each violation creates doubt. Collectively, they make it impossible to have confidence in [EVALUATOR] conclusions.

4. Reasonable Probability of Effect on Conclusions

If [EVALUATOR] had followed CCR Title 9:
- Used only reliable sources (no anonymous tips, no cleared allegations)
- Distinguished facts from allegations (recognized 1994 as unproven)
- Corroborated hearsay (couldn't, so shouldn't have relied on it)
- Based opinions on adequate foundation (assessed prepubescent status)
- Considered alternative explanations (hebephilia, outside account manager)
- Identified sources ("credible" according to whom?)
- Acknowledged limitations (can't determine developmental status)

There is REASONABLE PROBABILITY - indeed, HIGH probability - that following CCR Title 9 would have led to different conclusions.

MATERIAL LEGAL ERROR #7: SPECULATION ABOUT MASTURBATION TO DEVIANT FANTASIES

A. The Legal Error

[EVALUATOR] engaged in pure speculation about unobserved private sexual behavior with ZERO evidentiary support.

This violates *People v. Wright's* prohibition on speculation.

B. The Speculation (Report p. 22)

[EVALUATOR] states:

"[PATIENT] has been reinforcing his deviant sexual interests...and LIKELY IN OTHER WAYS AS WELL (e.g., masturbation to deviant sexual thoughts and fantasies that were not vetted via polygraph testing)."

C. Why This Is Pure Speculation

Evidence [EVALUATOR] Had Regarding Masturbation to Deviant Fantasies: ZERO

✗ No observations of such behavior
✗ No statements from [PATIENT] admitting to this
✗ No treatment notes documenting this
✗ No evidence from any source
✗ NOTHING

The word "LIKELY" = Admitted Speculation

[EVALUATOR] admits he is GUESSING by using "likely in other ways as well."

This is not an evidence-based finding - it is admitted conjecture about unobservable private behavior.

D. Additional Problems

1. Polygraph Not Required for WIC §6602

Polygraph testing is NOT required for WIC §6602 detainees. It is a VOLUNTARY component of treatment, not mandatory.

[EVALUATOR] penalizes [PATIENT] for not completing a non-required assignment.

2. Using Absence of Evidence as Evidence

[EVALUATOR] speculates about "fantasies that were not vetted via polygraph."

He is using the ABSENCE of polygraph results as EVIDENCE of hidden deviant fantasies.

This is logically fallacious and violates *Wright*.

3. Ignoring Treatment Progress

[PATIENT] advanced to Module III (Community Reintegration), the FINAL treatment module. This demonstrates:

- Successful completion of Modules I and II
- Significant treatment engagement and progress
- Preparation for community reintegration

Yet [EVALUATOR] speculates about unobservable private behavior to undermine this documented progress.

E. Why This Is a *Wright* Violation

Wright prohibits filling evidentiary gaps with speculation.

Evidentiary Gap: Is [PATIENT] masturbating to deviant fantasies?
Evidence: ZERO

What [EVALUATOR] Did: Speculated ("LIKELY in other ways") to create negative finding where no evidence exists.

***Wright* Holding:** Speculation cannot support conclusions in SVP cases

F. Materiality

This speculation is material because:

1. Used to Conclude Treatment Inadequate

[EVALUATOR] uses this speculation to characterize treatment as inadequate, despite Module III advancement.

2. Goes to Current Risk Assessment

Speculation about current masturbation behavior affects conclusion about current risk level.

3. Demonstrates Pattern of Speculation

This is part of systematic pattern of speculation throughout evaluation, undermining confidence in all conclusions.

4. Reasonable Probability of Effect

If [EVALUATOR] had:
- Based conclusions on actual evidence only
- Not speculated about unobserved behavior
- Given appropriate weight to Module III advancement
- Assessed treatment progress accurately

There is reasonable probability of different conclusion about treatment adequacy and current risk.

MATERIAL LEGAL ERROR #8: SPECULATION THAT LEGAL IMAGES = "REINFORCING DEVIANT INTERESTS"

A. The Legal Error

[EVALUATOR] speculated that LEGAL, NON-CONTRABAND images constitute "reinforcing deviant interests" without any evidence they were used for sexual purposes.

This violates Wright's prohibition on speculation.

B. [EVALUATOR] Speculation (Report pp. 5-6, 11)

[EVALUATOR] Conclusion (Report p. 11):

"[PATIENT]'s DPS reports over this review period indicate that he MAY BE CONTINUING TO REINFORCE his deviant sexual interests."

Critical Admissions by [EVALUATOR]:

- Images were "not illegal per PC 311.4" (Report p. 5)
- Images were "not contraband at CSH" (Report p. 5)

Translation: Images were legal clothed photographs that don't violate any law or facility rule.

C. Why This Is Speculation

1. No Evidence Images Used for Sexual Arousal

Legal clothed photographs of children exist in many contexts:

- Family photos
- School pictures
- Advertisements
- Stock photos
- Social media
- News articles

[EVALUATOR] provides NO EVIDENCE these particular images were used to "reinforce deviant interests" rather than having innocent explanation.

2. Investigation Found No Devices

DPS investigation was based on belief [PATIENT] had either a modified tablet or cell phone.

Investigation found NO such devices.

Without devices, there's no evidence [PATIENT] sent anything himself or accessed anything for deviant purposes.

3. Alternative Explanation Not Considered

Obvious alternative explanation: Someone OUTSIDE the hospital manages [PATIENT]'s online accounts or social media. (This is common practice for patients within the Hospital)

This would explain:

- How images appeared in communications
- Why no devices found in [PATIENT]'s possession
- How contact occurred without [PATIENT]'s direct involvement

CCR §4013(b) REQUIRES considering alternative explanations. [EVALUATOR] didn't.

4. Never Asked [PATIENT]

[EVALUATOR] received DPS reports AFTER his interview with [PATIENT].

He never asked:

- Does anyone outside manage your accounts?
- Do you have access to devices?
- What is your explanation?

He just ASSUMED deviant purpose based on existence of legal images.

D. Wright Violation

Evidentiary Gap: Were legal images used to "reinforce deviant interests"?

Evidence: Images were legal and non-contraband (that's it).

What [EVALUATOR] Did: Speculated they were used to reinforce deviant interests.

Problem: Legal images don't inherently connect to sexual deviance. Many innocent explanations exist. Without evidence of sexual use, speculation about purpose violates *Wright*.

E. Materiality

This speculation is material because:

1. Goes to Current Risk Assessment

[EVALUATOR] uses this as evidence [PATIENT] is "continuing to reinforce" deviant interests, affecting current risk assessment.

2. Based on Failed Investigation

Investigation found NO devices - allegation's factual basis was dis-proven, yet [EVALUATOR] uses as if confirmed.

3. Part of Pattern of Speculation

Another instance in systematic pattern of speculation throughout evaluation.

4. Reasonable Probability of Effect

If [EVALUATOR] had:

- Recognized images were legal and non-contraband
- Acknowledged investigation found no devices
- Considered alternative explanation (outside account manager)
- Not speculated about purpose without evidence

There is reasonable probability of different conclusion about current risk.

CUMULATIVE EFFECT OF MATERIAL LEGAL ERRORS

A. The Errors Are Not Isolated

[EVALUATOR] evaluation contains EIGHT CATEGORIES of material legal error:

1. Speculation about prepubescent status (*Wright*)
9. Including post-pubescent 16-year-old in prepubescent diagnosis

10. Failure to conduct differential diagnosis (CCR §4013)
11. Use of dismissed, uncharged allegations
12. Reliance on stale evidence (2-3 years old)
13. Multiple violations of CCR Title 9 protocol
14. Speculation about masturbation to deviant fantasies (*Wright*)
15. Speculation that legal images = reinforcing deviance (*Wright*)

B. The Errors Are Interrelated and Compound

DIAGNOSTIC FOUNDATION ERRORS:

- Error #1 (prepubescent speculation) → prevented differential diagnosis (Error #3)
- Error #2 (16-year-old included) → suggests not pedophilia
- Error #3 (no differential diagnosis) → avoided hebephilia issue

Result: Wrong diagnosis, may not meet WIC §6602(b).

EVIDENTIARY ERRORS:

- Error #4 (uncharged allegations) → wrong diagnostic specifier
- Error #5 (stale evidence) → wrong current risk assessment
- Error #6 (CCR violations) → unreliable methodology throughout

Result: Unreliable evidence base, undermines all conclusions

SPECULATION ERRORS:

- Error #7 (masturbation speculation) → inflated risk assessment
- Error #8 (legal images speculation) → inflated current concerns
- All tied to Error #6 (CCR §4013 - must consider alternatives)

Result: Speculation substituted for evidence at multiple junctures.

C. Cumulative Impact Destroys Confidence

Each error alone creates reasonable doubt. Together, they make it IMPOSSIBLE to have confidence in [EVALUATOR] conclusions.

Foundation is unsound: Core diagnosis based on speculation (Error #1)

Methodology is unreliable: CCR violations throughout (Error #6)

Evidence is inadequate: Dismissed allegations (Error #4), stale evidence (Error #5)

Speculation permeates: Errors #1, #7, #8 all involve speculation

Professional standards violated: Errors #3, #6 violate basic standards

There is MORE than "reasonable probability" that errors affected conclusions - there is CERTAINTY.

D. Alternative Outcome Without Errors

If [EVALUATOR] had NOT made these errors:

Proper Diagnostic Process:

✓ Assess actual developmental status of victims
✓ Review police reports, court records, medical literature
✓ Conclude 3 of 4 likely pubescent, one post-pubescent
✓ Conduct differential diagnosis: pedophilia vs. hebephilia
✓ Conclude pattern more consistent with hebephilia
✓ Recognize hebephilia NOT in DSM-5-TR
✓ [PATIENT] does NOT meet WIC §6602(b) requirement

Proper Evidence Use:

✓ Exclude dismissed, uncharged allegations (Error #4)
✓ Diagnostic specifier: "attracted to males" not "both"
✓ Recognize 2-3 year old evidence is stale (Error #5)
✓ Give appropriate weight to Module III advancement

Proper Risk Assessment:

✓ Base conclusions on evidence only, not speculation (Errors #7, #8)
✓ Consider alternative explanations (CCR §4013)
✓ Acknowledge limitations (CCR §4014)

Likely Conclusion:

- Pattern more consistent with hebephilia than pedophilia
- Hebephilia not a DSM disorder
- Does not meet WIC §6602 requirements
- Treatment progress (Module III) supports community placement
- **Recommend AGAINST continued commitment**

THE HEBEPHILIA ISSUE: PROFOUND LEGAL CONSEQUENCES

A. The Central Legal Question

If the correct diagnosis is hebephilia rather than pedophilia, does [PATIENT] meet WIC §6602(b)'s requirement for a mental disorder "specified in the DSM"?

Answer: NO.

B. Hebephilia Is Not in DSM-5-TR

The DSM-5 committee explicitly considered hebephilia for inclusion and REJECTED it.

Reasons for rejection:

- Insufficient evidence of clinical significance
- Concerns about forensic misuse (*especially in SVP cases*)
- Lack of clear boundaries between normal and abnormal
- Risk of pathologizing normal attraction to pubescent adolescents

Result: Hebephilia is NOT listed in DSM-5-TR as a mental disorder.

C. Why Hebephilia May Be the Correct Diagnosis

Evidence Supporting Hebephilia Over Pedophilia:

1. Victim Age Pattern

- Ages: 16, 12, 11, 11
- Range: 11-16 years
- This is the CLASSIC age range for hebephilia

- Does NOT fit pedophilia (prepubescent)

2. Medical Evidence

- 16-year-old: 100% post-pubescent (doesn't fit pedophilia at all)
- 12-year-old: 60-80% probability pubescent
- 11-year-olds: 30-50% probability pubescent each
- Result: 2-3 of 4 MORE LIKELY pubescent than prepubescent

3. No Evidence Anyone Was Prepubescent

- Zero evidence of prepubescent status
- [EVALUATOR] never assessed developmental status
- Medical probability suggests most were NOT prepubescent

4. Pattern Inconsistent with Pedophilia

- Including post-pubescent 16-year-old
- Age range extends to post-pubescent
- No evidence of attraction to prepubescent characteristics

D. Legal Consequence If Hebephilia Is Correct

IF hebephilia is correct diagnosis:

Step 1: Hebephilia NOT in DSM-5-TR
Step 2: WIC §6602(b) requires disorder "specified in the DSM"
Step 3: Hebephilia does NOT satisfy WIC §6602(b)
Step 4: Statutory requirement NOT met
Step 5: NO legal basis for continued commitment

This is not a clinical disagreement - it's a legal question: Does the individual have a DSM-specified disorder?

If answer is NO → commitment cannot be sustained.

E. This Is Material Legal Error Under *Ghilotti*

Ghilotti defines material legal error as error going to whether statutory prerequisites are satisfied.

[EVALUATOR] diagnostic error goes DIRECTLY to WIC §6602(b) - whether [PATIENT] has a "diagnosed mental disorder" specified in the DSM.

This is EXACTLY what *Ghilotti* means by "material" legal error:

- Goes to statutory requirement
- Not a matter of clinical judgment
- Affects legal eligibility for commitment

F. Probability Assessment

How likely is it the correct diagnosis is hebephilia?

Based on:
- Medical evidence (2-3 of 4 likely pubescent)
- Age pattern (11-16, classic hebephilia range)
- Inclusion of post-pubescent victim
- No evidence of prepubescent status

Probability that pattern is hebephilia rather than pedophilia: HIGH

If hebephilia: Probability WIC §6602(b) NOT met: 100%

Overall: High probability statutory requirements NOT satisfied

REMEDY REQUESTED

A. Strike [EVALUATOR] Evaluation

This court should strike [EVALUATOR] evaluation dated December 11, 2025, in its entirety as infected with material legal error.

Legal basis:

- *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888
- *Wright v. Superior Court* (2012) 204 Cal.App.4th 879
- *People v. Wright* (2016) 4 Cal.App.5th 537

B. Order New Independent Evaluation

Under *Wright v. Superior Court* (2012) 204 Cal.App.4th 879:

"The remedy we expressly ordered in *Ronje* to cure the underlying error was new evaluations under section 6601 including, if required, evaluations conducted by two independent evaluators."

This court should order complete new evaluation by independent evaluator NOT employed or contracted by Department of State Hospitals, or the Office of the District Attorney.

C. Specific Requirements for New Evaluation

The new evaluation must:

1. Properly Assess Prepubescent Status

Cannot diagnose pedophilia without assessing whether victims were actually prepubescent.

Must:

- Review police reports with physical descriptions (if available)
- Review court transcripts with victim testimony/descriptions (if available)
- Review any available medical records
- Consult medical literature on pubertal development (Herman-Giddens et al.)
- Make determination based on EVIDENCE, not speculation
- Acknowledge if unable to determine with certainty

2. Conduct Differential Diagnosis

MUST explicitly consider hebephilia vs. pedophilia and explain reasoning.

Must:

- Analyze whether victims prepubescent or pubescent
- Consider medical probabilities based on ages

- Explain why chosen diagnosis is correct
- Acknowledge if diagnostic uncertainty exists
- Address fact that hebephilia is not DSM disorder and legal implications

3. Use Only Reliable, Admissible Evidence

Cannot use:

✗ Dismissed, uncharged allegations
✗ Uncorroborated hearsay
✗ Anonymous tips
✗ Stale evidence (2+ years old) as current status
✗ Speculation about unobserved behavior

Must use:

✓ Only adjudicated conduct
✓ Current, reliable information
✓ Properly corroborated evidence
✓ Evidence-based conclusions only

4. Follow CCR Title 9 Protocol

Must comply with all requirements of CCR Title 9, §§4010-4014:

- Use reliable sources (§4011)
- Distinguish facts from allegations (§4011)
- Corroborate hearsay (§4012)
- Base opinions on adequate foundation (§4013)
- Consider alternative explanations (§4013)
- Identify sources clearly (§4014)
- Acknowledge limitations (§4014)

5. Follow Wright Principles

- No speculation filling evidentiary gaps.
- Evidence-based conclusions only.
- Acknowledge analytical gaps.

D. If New Evaluation Finds Hebephilia or Diagnostic Uncertainty

Scenario 1: New Evaluator Concludes Hebephilia

If new evaluation concludes pattern is hebephilia (not pedophilia):

- Hebephilia NOT in DSM-5-TR
- WIC §6602(b) NOT satisfied
- No statutory basis for commitment

Result under *Wright* (2012): "The expiring words of the SVPA and *Ghilotti* require dismissal of the SVPA commitment petition if the new evaluations failed to produce the concurrence required to support the filing of an SVPA commitment petition."

Petition for continued commitment should be DISMISSED.

Scenario 2: New Evaluator Cannot Determine Developmental Status

If new evaluator cannot determine whether victims were prepubescent:

- Cannot diagnose pedophilia (requires prepubescent)
- Cannot diagnose hebephilia (requires pubescent)
- Diagnostic uncertainty

Result: Cannot prove beyond reasonable doubt that [PATIENT] has diagnosed mental disorder required by WIC §6602.

Petition for continued commitment should be DISMISSED.

E. Alternative Remedy: Allow [EVALUATOR] to Correct

Under *Ghilotti*, court could allow [EVALUATOR] opportunity to correct his report:

"If the court does find... 'material legal error in an evaluator's report, the court shall provide the evaluator opportunity promptly either to correct the report or to prepare a new report...'" (*Ghilotti*, *supra*, 27 Cal.4th at pp. 913-914.)

However, given:

- MAGNITUDE of errors (8 categories)

- NUMBER of errors (multiple violations in each category)
- SYSTEMATIC nature (errors permeate entire evaluation)
- Goes to FUNDAMENTAL COMPETENCE (doesn't understand developmental stages)
- Training violation (trained on *Wright*, ignored it)

A new independent evaluation is more appropriate than allowing correction.

CONCLUSION

[EVALUATOR]'s evaluation of [PATIENT] dated December 11, 2025, is infected with material legal error in multiple respects:

DIAGNOSTIC ERRORS:

1. Speculation about prepubescent status (*People v. Wright* violation)
2. Including 16-year-old in "prepubescent" diagnosis
3. Failure to conduct differential diagnosis (CCR §4013)

EVIDENTIARY ERRORS:

4. Use of dismissed, uncharged allegations
5. Reliance on stale evidence (2-3 years old)
6. Multiple CCR Title 9 violations

SPECULATION ERRORS:

7. Speculation about masturbation to deviant fantasies (*Wright*)
8. Speculation that legal images = reinforcing deviance (*Wright*)

Each error alone creates reasonable doubt. Together, they destroy confidence in [EVALUATOR] conclusions.

Most critically: The diagnostic error may mean [PATIENT] does NOT have a "diagnosed mental disorder" under DSM-5-TR. If the pattern is hebephilia (not

pedophilia), hebephilia is NOT in DSM-5-TR, and [PATIENT] does NOT meet WIC §6602(b) statutory requirements.

This is material legal error under *Ghilotti* because it goes directly to whether statutory prerequisites for commitment are satisfied.

There is reasonable probability—indeed, HIGH probability—that these errors affected [EVALUATOR] ultimate conclusion. Without these errors, proper evaluation may have concluded [PATIENT] does NOT meet WIC §6602 criteria.

For these reasons, Respondent respectfully requests this court:

1. Strike [EVALUATOR] evaluation dated December 11, 2025
2. Order new independent evaluation following requirements set forth above
3. If new evaluation finds hebephilia or diagnostic uncertainty, dismiss petition for continued commitment

Respectfully submitted,

Dated: _____ _____
[PATIENT]

EXHIBITS LIST

Exhibit A: Evaluation Report of [EVALUATOR], Psy.D., dated _____, 2026
Exhibit B: People v. Wright (2016) 4 Cal.App.5th 537
Exhibit C: Herman-Giddens et al. (2012), "Secondary Sexual Characteristics in Boys," Pediatrics, 130(5), e1058-e1068
Exhibit D: CCR Title 9, §§4010-4014
Exhibit E: DSM-5-TR Pedophilic Disorder Diagnostic Criteria
Exhibit F: Treatment records showing Module III advancement
Exhibit G: [Any other relevant exhibits]

APPENDIX B - Research

Research Articles and Scientific Literature Referenced in This Handbook

Alphabetical by First Author's Last Name

HOW TO USE THIS APPENDIX

This appendix collects every peer-reviewed article, scientific study, and research publication cited throughout this handbook. Each entry provides the full citation with complete publication details, followed by a brief note explaining the specific forensic significance of the source in SVP proceedings. All 30 entries are listed in alphabetical order by first author's last name. Where an entry involves an institutional author (e.g., American Psychiatric Association), it is listed alphabetically by the institution's name.

Note: Legal authorities (case law and statutes) are not included in this appendix. For the controlling case law on SVPA proceedings and civil discovery, see the case citations throughout the handbook text.

1	**American Psychiatric Association, Task Force on Dangerous Sex Offenders (1999).**
	Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association. Washington, DC: American Psychiatric Association.
	Significance: The APA's own task force concluded that paraphilic disorders 'do not involve volitional impairment' and that the presence of a paraphilic disorder does not, by itself, establish serious difficulty controlling behavior. Foundational authority for challenging volitional impairment findings in SVP proceedings.

2	**American Psychiatric Association (2022).**
	Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR). Washington, DC: American Psychiatric Publishing.
	Significance: The operative diagnostic standard for all paraphilic disorder diagnoses in SVPA proceedings. Sets the Criterion A and Criterion B requirements for each paraphilic disorder, including the prepubescent victim age requirement for Pedophilic Disorder. Explicitly states that a clinical diagnosis is not sufficient to establish volitional impairment.

	Balon, Richard (2016).

3	*DSM-5 and Paraphilias: What Do Clinicians Know?* Journal of Sex and Marital Therapy, 42(5), 391–393.
	Significance: Documents 'lack of' diagnostic consensus and reliability even for named paraphilic categories. Used in challenging Voyeuristic Disorder and other paraphilic diagnoses made without objective assessment evidence.

4	**Chevalier, Caroline S., Boccaccini, Marcus T., Murrie, Daniel C., & Varela, Jorge G. (2015).**
	Static-99R Reporting Practices in Sexually Violent Predator Cases: Does Norm Selection Reflect Adversarial Allegiance? Law and Human Behavior, 39(3), 209–218. DOI: 10.1037/lhb0000114. (Published online Dec. 15, 2014; print publication 2015.)
	Significance: Surveyed 109 SVP evaluators and found systematic adversarial allegiance in Static-99R norm selection: prosecution evaluators favored reporting practices conveying highest possible risk; defense evaluators favored practices conveying lowest risk. State-agency evaluators aligned more closely with prosecution evaluators. Foundational authority for challenging the 'objectivity' of the state's risk estimates.

5	**Doren, Dennis M., & Thornton, David (2012).**
	Volitional Impairment as Applied in SVP Proceedings Has Never Been Validated. Cited in the literature on SVP risk assessment methodology; see also Scurich, Martinez, & Krauss (2025), Criminal Justice and Behavior.
	Significance: Doren and Thornton — two of the most widely cited researchers in SVP evaluation — concluded that volitional impairment as applied in SVP proceedings 'has never been validated' as a clinical construct. Foundational challenge to volitional impairment conclusions.

6	**First, Michael B. (2014).**
	DSM-5 Proposals for Paraphilias: Recommendations for the DSM-5. Journal of the American Academy of Psychiatry and the Law, 42(2), 191–201.
	Significance: Comprehensive critique of paraphilic disorder diagnosis in forensic settings. Establishes that offense behavior alone is insufficient to satisfy Criterion A; the behavior must be a manifestation of an atypical arousal pattern. Critical for challenging diagnoses made without objective assessment evidence (PPG, ABEL/AASI-3). Addresses Voyeuristic Disorder, Exhibitionistic Disorder, Frotteuristic Disorder, and Other Specified Paraphilic Disorder.

	First, Michael B., & Halon, Robert L. (2008).

7	*Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases.* Journal of the American Academy of Psychiatry and the Law, 36(4), 443–454.
	Significance: Examines the systematic misuse of paraphilia NOS and other paraphilic diagnoses in SVP proceedings. Provides a diagram illustrating the relationship among all sexual offenders, those with paraphilias, and those with volitional impairment — demonstrating that these categories do not overlap as broadly as SVP evaluators suggest.

8	**Frances, Allen (2011).**
	Paraphilia NOS, Nonconsent: Not Ready for the Courtroom. Journal of the American Academy of Psychiatry and the Law, 39(4), 555–561.
	Significance: Argues that Paraphilia NOS, Nonconsent (now Other Specified Paraphilic Disorder, Nonconsent) lacks scientific validity as a diagnosable mental disorder. States 'the idea that rape is a mental disorder' is unsupported. Authoritative challenge to OSPD-Nonconsent diagnoses in SVP proceedings.

9	**Frances, Allen (2013).**
	Saving Normal: An Insider's Revolt Against Out-of-Control Psychiatric Diagnosis, DSM-5, Big Pharma, and the Medicalization of Ordinary Life. New York: William Morrow.
	Significance: Frances, as DSM-IV Task Force Chair, argues that diagnosing rape as a mental disorder is a misuse of psychiatry. Provides authoritative background context for challenging rape-related OSPD diagnoses in SVP proceedings.

10	**Frances, Allen, & First, Michael B. (2011).**
	Hebephilia Is Not a Mental Disorder in DSM-IV-TR and Should Not Become One in DSM-5. Journal of the American Academy of Psychiatry and the Law, 39(1), 78–85.
	Significance: The leading published authority establishing that hebephilia is not a recognized DSM diagnosis, was not intended to be included in DSM-IV-TR, and lacks sufficient scientific support to serve as a qualifying mental disorder in SVP proceedings. Critical for any case where the diagnosis is Pedophilic Disorder or hebephilia-based OSPD applied to pubescent victims.

11	**Garrick, Thomas M., Frayne, Susan M., & Hulse, Jennifer M. (2008).**
	Sexual Violence Risk Assessment of the Manic Patient. Journal of the American Academy of Psychiatry and the Law, 36(3), 375–381.
	Significance: Documents that mania and bipolar disorder are associated with increased

	consensual risky sexual behavior, not sexually predatory conduct. Critical for challenging Bipolar Disorder as a qualifying SVP mental disorder — the nexus to sexually violent predatory behavior is not established by the clinical research.

12	**Hanson, R. Karl, & Bussière, Monique T. (1998).**
	Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies. Journal of Consulting and Clinical Psychology, 66(2), 348–362. DOI: 10.1037/0022-006X.66.2.348.
	Significance: Landmark 61-study meta-analysis (n = 23,393) establishing that sexual interest in children as measured by phallometric assessment was the single strongest predictor of sexual offense recidivism. Used to establish that if an evaluator did not assess deviant sexual interest using objective measures (PPG, ABEL/AASI-3), the evaluation lacks the most validated predictor.

13	**Hanson, R. Karl, Harris, Andrew J.R., Scott, Terri-Lynne, & Helmus, Leslie (2007).**
	Assessing the Risk of Sexual Offenders on Community Supervision: The Dynamic Supervision Project. Corrections Research User Report No. 2007-05. Ottawa: Public Safety Canada.
	Significance: The foundational government research report establishing and validating the STABLE-2007 dynamic risk assessment instrument. The STABLE-2007 was designed to assess community supervision populations — not institutionalized individuals. The report's own findings on the limitations of dynamic factor scoring in continuous institutional settings are directly relevant to challenging STABLE-2007 scores in SVP evaluations.

14	**Helmus, Leslie, Hanson, R. Karl, Thornton, David, Babchishin, Kelly M., & Harris, Andrew J.R. (2012).**
	Absolute Recidivism Rates Predicted by Static-99R and Static-2002R Sex Offender Risk Assessment Tools Vary Across Samples: A Meta-Analysis. Criminal Justice and Behavior, 39(9), 1148–1171. DOI: 10.1177/0093854812443648.
	Significance: The definitive meta-analysis (23 samples; n = 8,106) establishing that Static-99R normative data significantly overestimated actual recidivism — the norms estimated 73% more recidivists than there actually were in field samples. Foundational authority for challenging the accuracy of the recidivism rate estimates presented by the state's evaluator.

15	**Helmus, Leslie, Thornton, David, Hanson, R. Karl, & Babchishin, Kelly M. (2012).**
	Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex

Offenders: Revised Age Weights.
Sexual Abuse: A Journal of Research and Treatment, 24(1), 64–101. DOI: 10.1177/1079063211409951.

Significance: Establishes the revised age-weighted scoring system (Static-99R) and documents that actuarial scales overestimate recidivism for older offenders. Used to challenge Static-99R scores and recidivism estimates for older respondents and to require the age correction factor be properly applied.

16 **Kopeykina, Irina, et al. (2016).**

Hypersexuality and Its Relationship to Bipolar Disorder.
International Journal of Bipolar Disorders, 4(1), 1–8.

Significance: Review finding that bipolar disorder-related hypersexuality is associated with increased consensual risky sexual behavior — not nonconsensual or predatory sexual violence. Used to challenge Bipolar Disorder as establishing the required nexus between mental disorder and likelihood of sexually violent predatory conduct.

17 **Langström, Niklas, & Seto, Michael C. (2006).**

Exhibitionistic and Voyeuristic Behavior in a Swedish National Population Survey.
Archives of Sexual Behavior, 35(4), 427–435.

Significance: Swedish national study finding that 7.7% of both men and women reported engaging in voyeuristic behavior at least once. Establishes that voyeuristic behavior is common in the general population and therefore does not itself establish the atypical arousal pattern required for Voyeuristic Disorder under Criterion A of DSM-5-TR.

18 **Marshall, W.A., & Tanner, J.M. (1969, 1970).**

Variations in Pattern of Pubertal Changes in Girls (1969); Variations in the Pattern of Pubertal Changes in Boys (1970).
Archives of Disease in Childhood, 44(235), 291–303 (1969); Archives of Disease in Childhood, 45(239), 13–23 (1970).

Significance: The original published research establishing the Tanner Staging system — the gold-standard clinical framework for assessing pubertal status. Foundational authority for the requirement that Pedophilic Disorder diagnoses be grounded in evidence of prepubescent (Tanner Stage 1) victim status, not chronological age alone.

19 **Marshall, William L., & Fernandez, Yolanda M. (2003).**

Phallometric Testing with Sexual Offenders: Theory, Research, and Practice.
Brandon, VT: Safer Society Press. (Cited in Wakefield (2011), International Journal

	of Law and Psychiatry, 34, 195–209.)
	Significance: Review of 10 phallometric studies documenting that 9 of 10 studies of rapists failed to confirm a deviant arousal pattern distinguishable from non-offenders. Used to challenge Frotteuristic Disorder and Exhibitionistic Disorder diagnoses made without objective phallometric or ABEL/AASI-3 assessment evidence.

20	**Perillo, Anthony D., Spada, Amanda H., Calkins, Cynthia, & Jeglic, Elizabeth L. (2014).**
	Examining the Scope of Questionable Diagnostic Reliability in Sexually Violent Predator (SVP) Evaluations. International Journal of Law and Psychiatry, 37(2), 190–197.
	Significance: Documents the interrater reliability problems with paraphilic disorder diagnoses in SVP proceedings, including low reliability even for the named categories. Foundation for cross-examining evaluators on the reliability of any paraphilic diagnosis applied in the case.

21	**Phenix, Amy, Fernandez, Yolanda M., Harris, Andrew J.R., Helmus, Leslie, Hanson, R. Karl, & Thornton, David (2016).**
	Static-99R Coding Rules Revised — 2016. Ottawa: Public Safety Canada. Available at www.static99.org.
	Significance: The controlling scoring manual for the Static-99R. Used to identify scoring errors, verify item-by-item coding, and establish the basis for each scored item. Any deviation from these coding rules by the state's evaluator is a methodological error subject to challenge.

22	**Rogers, Richard, & Jackson, Rebecca L. (2005).**
	Sexually Violent Predators: The Risky Enterprise of Risk Assessment. Journal of the American Academy of Psychiatry and the Law, 33(4), 523–528.
	Significance: Establishes that 'volitional impairment is systematically ignored by all risk assessment measures.' Documents the fundamental deficiency of retrofitting generic risk assessment tools (Static-99R, Stable-2007) to address SVP volitional impairment criteria. One of the most important published critiques of SVP evaluation methodology.

23	**Rogers, Richard, & Shuman, Daniel W. (2005).**
	Fundamentals of Forensic Practice: Mental Health and Criminal Law. New York: Springer. (Key passages cited in Journal of the American Academy of Psychiatry and the Law, 33(4), 523.)
	Significance: Recipient of the Guttmacher Award from the American Academy of Psychiatry

	and the Law. Establishes that 'the simple co-occurrence of a clinical diagnosis and a prior sexual offense does not establish volitional impairment' and that the nexus 'cannot be inferred' from diagnosis or offense history alone.

24	**Scurich, Nicholas, Martinez, Marc A., & Krauss, Daniel A. (2025).**
	Unraveling Volitional Impairment: Forensic Psychological Perspectives on Volitional Impairment in Sexually Violent Person Commitments. Criminal Justice and Behavior, 1–22. Published online December 4, 2025. DOI: 10.1177/00938548251389454.
	Significance: Survey of 29 experienced SVP evaluators (mean experience > 20 years) finding substantial, often contradictory, variability in expert conclusions about volitional impairment. Confirms that volitional impairment remains a poorly defined, inconsistently applied construct lacking empirical consensus. Documents that historical behavior alone is insufficient to establish volitional impairment, and that testing is required.

25	**Seto, Michael C., Fedoroff, J. Paul, Bradford, John M., Barbaree, Howard E., Curry, Susan, Greenberg, David M., & Blanchard, Ray (2016).**
	Reliability and Validity of the Structured Risk Assessment — Forensic Version in a Sample of Adult Males Convicted of Sex Crimes Against Children. Psychological Assessment, 28(12), 1560–1571. (See also interrater reliability data published in ScienceDirect/Archives of Sexual Behavior.)
	Significance: Tests interrater reliability of pedophilic disorder diagnosis and related assessments. Used to challenge the reliability of the evaluator's pedophilic disorder diagnosis when the diagnosis was made without objective assessment evidence such as phallometric testing.

26	**Sreenivasan, Shoba, Weinberger, Linda E., & Garrick, Thomas (2003).**
	Expert Testimony in Sexually Violent Predator Commitments: Conceptualizing Legal Standards of 'Mental Disorder' and 'Likely to Reoffend.' Journal of the American Academy of Psychiatry and the Law, 31(4), 471–485.
	Significance: Examines what constitutes a qualifying mental disorder and the standard for likelihood of reoffending in SVP proceedings. Precursor to Vognsen & Phenix (2004) and Sreenivasan et al. (2020) on the ASPD nexus question.

27	**Sreenivasan, Shoba, et al. (2020).**
	Antisocial Personality Disorder in SVP Proceedings: Scientific and Legal Standards. Journal of the American Academy of Psychiatry and the Law, 48(2).

Significance: Establishes that ASPD criteria 'do not include any requirement of a predisposition to deviant sexual behavior or volitional or emotional impairment' specifically related to sexually violent conduct. ASPD 'is a polythetic diagnosis' with no specific sexual predatory nexus. Foundational challenge to ASPD as a qualifying mental disorder in SVP proceedings.

28 **Vognsen, Jennifer, & Phenix, Amy (2004).**

Antisocial Personality Disorder Is Not Enough: A Reply to Sreenivasan, Weinberger, and Garrick.

Journal of the American Academy of Psychiatry and the Law, 32(4), 440–442.

Significance: Co-authored by Amy Phenix, developer of the Static-99R. States that 'a clear sexual disorder must be present before a person can be found to be an SVP/SDP. A diagnosis of antisocial personality disorder is not enough.' Directly undermines ASPD-only SVP commitment justifications.

29 **Wakefield, Jerome C. (2011).**

DSM-5 Proposed Diagnostic Criteria for Sexual Paraphilias: Tensions Between Diagnostic Validity and Forensic Utility.

International Journal of Law and Psychiatry, 34(3), 195–209.

Significance: Analyzes the DSM criteria for paraphilic disorders and the tensions between valid clinical diagnosis and forensic misuse. Documents Marshall and Fernandez phallometric evidence undermining exhibitionistic and frotteuristic diagnoses made without objective assessment. Used in challenging multiple paraphilic diagnoses applied without phallometric testing.

30 **Winsmann, Frederick (2012).**

Assessing Volitional Impairment in Sexually Violent Predator Evaluations.

Sexual Offender Treatment: Journal of the International Association for the Treatment of Sexual Offenders, 7(1), 1–14. DOI: 10.1037/e571212013-123.

Significance: Recommends specific neurocognitive assessment tools for evaluating volitional capacity, including the Wisconsin Card Sorting Test (WCST), Iowa Gambling Task (IGT), and Barratt Impulsiveness Scale–11 (BIS-11). Specifically cautions 'against relying solely on past actions to determine impairment' — the very methodology routinely employed by California SVP evaluators. Used to establish that evaluators who relied only on offense history failed to use validated methods for assessing the construct they purported to measure.

APPENDIX C – Evaluator Handbook 2008

The full Clinical Evaluator Handbook And Standardized Assessment Protocol can be located at the following link:

www.defenseforsvp.com/Resources/EvaluatorsHandbook/11-08EvaluatorHandbookRevised_.pdf

APPENDIX D – Title 9 Sections

California Code of Regulations

Title 9. Rehabilitative and Developmental Services

Division 1. Department of Mental Health

Chapter 15. Assessment of Sexually Violent Predators

Sections 4010 through 4014

NOTE REGARDING SECTION NUMBERING

California Code of Regulations, Title 9, Chapter 15 (Assessment of Sexually Violent Predators) does not contain a Section 4010. The chapter numbering proceeds from §§ 4000–4005 (adopted February 6, 2009, operative February 6, 2009) directly to §§ 4011–4015 (adopted January 15, 2019, operative April 1, 2019). There is no § 4010 in the current or historical codification of Chapter 15.

Accordingly, this Appendix reproduces §§ 4011, 4012, 4013, and 4014, which constitute the operative Standardized Assessment Protocol regulatory sections governing all SVP evaluations. The text reproduced herein is taken verbatim from the Final Regulation Text approved by the California Office of Administrative Law on January 15, 2019 (OAL Matter Number 2018-1130-06), as published at Cal. Code Regs., tit. 9, §§ 4011–4014.

§ 4011. Evaluation Overview.

(a) Sexually Violent Predator (SVP) evaluations conducted pursuant to Welfare and Institutions Code section 6601, subdivision (c) shall be completed pursuant to this Chapter. For the purpose of this Chapter, "Evaluator" refers to the forensic evaluator conducting the SVP evaluation, and "Individual" refers to the subject of the interview, the inmate or person being evaluated.

(b) The evaluation shall address and provide an answer to the questions under the following Criteria titled as Criterion A, Criterion B, and Criterion C:

(1) Criterion A: Has the Individual been convicted of a sexually violent criminal offense against one or more victims as enumerated in Welfare and Institutions Code section 6600?

(2) Criterion B: Does the Individual have a Diagnosed Mental Disorder (DMD) that predisposes the Individual to the commission of criminal sexual acts?

(3) Criterion C: Without appropriate treatment and custody, is the Individual likely to engage in sexually violent predatory criminal acts as a result of his or her DMD?

NOTE: *Authority cited: Sections 4005.1, 4027 and 4101, Welfare and Institutions Code. Reference: Sections 6600, 6601, 6603 and 6604.9, Welfare and Institutions Code.*

§ 4012. Record Review.

The Evaluator shall conduct a review of the Individual's records. The Evaluator shall use due diligence in obtaining and reviewing available records which may include, but are not limited, to the California Department of Corrections and Rehabilitation (CDCR) central file, medical and psychiatric files, sexual interest testing which may include, but is not limited to, penile plethysmograph, polygraph, or visual reaction time measures, probation officers' reports, arrest reports, disciplinary reports, psychological evaluations, parole reports, and the record of arrests and prosecutions (RAP sheet).

NOTE: *Authority cited: Sections 4005.1, 4027 and 4101, Welfare and Institutions Code. Reference: Sections 6600, 6601, 6603 and 6604.9, Welfare and Institutions Code.*

§ 4013. Interview.

(a) The Evaluator shall review the Individual's Disability and Effective Communication System (DECS) printout from CDCR and make necessary accommodations to conduct the interview. If the DECS is not available for review, the Evaluator shall assess the Individual's ability to communicate by other reasonable means including but, not limited to testing the Individual's ability to comprehend and retain verbal communication. The Evaluator shall document any accommodations requested or needed. Upon the Individual's request, services of a language interpreter shall be provided to the Individual. If the Individual does not request the services of a language interpreter, the Evaluator shall assess the need to utilize a language interpreter and an interpreter shall be provided to the Individual if the Evaluator determines one is needed.

(b) The Evaluator should make a reasonable attempt to conduct a face-to-face interview with the Individual. Face-to-face interviews, include interviews conducted via video telepsychiatry.

(c) The Evaluator shall discuss with the Individual the nature of the evaluation process and attempt to obtain informed consent, as provided in Section 4014, subdivision (b)(3), and inform the Individual that non-identifying data may be used for research by the Department of State Hospitals. Throughout the interview, the Evaluator shall maintain a position of neutrality with regard to the SVP law. The Evaluator shall not provide legal advice to the

Individual regarding the Individual's decision to interview. If the Individual refuses to interview, the Evaluator shall document the refusal and inform the Individual that even without an interview, a SVP forensic report shall be written and submitted.

(1) The Evaluator shall make reasonable attempts to obtain informed consent. The Evaluator shall explain to the Individual the limits of confidentiality and the Evaluator's professional and legal obligation as a mandated reporter.

(2) At any point during the interview, the Evaluator shall not provide feedback to the Individual regarding the Evaluator's professional opinion about whether the Individual meets Criterion A, Criterion B, or Criterion C, or the Individual's diagnosis or risk level.

NOTE: *Authority cited: Sections 4005.1, 4027 and 4101, Welfare and Institutions Code. Reference: Sections 6600, 6601, 6603 and 6604.9, Welfare and Institutions Code.*

§ 4014. Forensic Report.

The Evaluator shall write a forensic report, which shall include the following sections.

(a) The Identifying Information section shall include: identifying data including the Individual's name, date of birth, CDCR number, California Information and Index (CII) number; the facility where the Individual is located; county of commitment; interview date; the date report was completed; earliest possible release date (EPRD); findings for Criterion A, Criterion B, and Criterion C; final outcome; and Evaluator name.

(b) The Notice of Evaluation section shall note the date the Individual was interviewed, the location of the interview, and the duration of the interview.

(1) This section shall indicate how the Evaluator used DECS, or other means if the DECS was not available, to determine whether effective communication was made, and whether any modifications or accommodations were needed and utilized for the face-to-face interview.

(2) This section shall include whether the Individual agreed to interview.

(3) This section shall indicate whether the Evaluator obtained informed consent from the Individual. The content of the informed consent procedure shall include a description of the purpose of the evaluation, the potential consequences of the evaluation outcomes, the reporting mandates of licensed psychologists or psychiatrists, and the potential use of non-identifying information from the submitted evaluations for program quality improvement projects. The reporting mandate includes, but is not limited to, any form of child abuse, neglect, or exploitation as required by the Child Abuse and Neglect Reporting Act, Penal Code sections 11164-11174.3 and the Elder Abuse and Dependent Adult Civil Protection Act, Penal Code sections 15600 et. seq.

(c) The Sources of Information section shall cite documents relied upon in the evaluation with document titles and dates, and origin of information.

(d) The Evaluation Procedures section shall include record review, clinical interview, mental status examination, and risk instruments utilized or risk factors considered.

(e) The Findings section shall have subsections each for Criterion A, Criterion B, and Criterion C.

(1) The Criterion A subsection shall provide an analysis and a conclusion as to whether the Individual has been convicted of a sexually violent criminal offense against one or more victims as enumerated in Welfare and Institutions Code section 6600.

(A) This subsection shall list the qualifying offenses or convictions and cite the source of the information.

1. A prior juvenile adjudication of a sexually violent offense may constitute a prior qualifying conviction if:

a. the juvenile was sixteen years of age or older at the time of the act;

b. the prior offense is a sexually violent offense specified in Welfare and Institutions Code section 6600, subdivision (b);

c. the juvenile was adjudged a ward of the juvenile court within the meaning of Welfare and Institutions Code section 6602; and

d. for the violent offense, the juvenile was committed to the Division of Juvenile Justice, a CDCR division previously known as the California Youth Authority (CYA).

2. A conviction that resulted in a finding that the person was a mentally disordered sex offender constitutes a prior qualifying conviction.

(B) For all qualifying offenses or convictions under one of the Penal Code sections listed in Welfare and Institutions Code section 6600, subdivision (b), and for each qualifying victim, the Evaluator shall describe facts of the qualifying offenses or convictions and indicate the following sexually violent elements: force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another individual, or threat to retaliate in the future against the victim or any other person. If facts of the qualifying offense or conviction are not available, the Evaluator shall make a reasonable attempt to obtain relevant information. Without other relevant facts, as to the qualifying offense or conviction, the Evaluator may rely solely on the Individual's recollection. The Evaluator shall discuss the validity and any limitation of the information relied upon and offered.

1. Force means to compel a person by physical means to overcome the will of that person. In determining whether force is present in the facts, consider all evidence as to whether the physical or mental state of the victim, including but, not limited to unconsciousness or intoxication, affected the ability of the victim to exert his or her will.

2. Violence means the application of physical force greater than what is necessary to accomplish the act.

3. Duress means the use of direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a person to perform an act or submit to an act to which he or she would not otherwise submit. In determining whether duress is present in the facts, consider the totality of the circumstances, including

but not limited to the age, mental state, physical stature, maturity of the victim; the victim-perpetrator relationship; and specific characteristics of the perpetrator.

4. Menace means any threat, statement, or act which shows intent to inflict injury upon another person.

5. Fear means the apprehension of the victim of physical harm, dread, or awareness of danger. When determining whether fear is present in the facts, consider whether the victim is actually afraid, reasonably or unreasonably, and whether the Individual is aware of and exploits the fear of the victim.

6. Threats to retaliate in the future by means of inflicting future harm against the victim or any other person. In determining whether a threat to retaliate is in the facts, consider whether the victim or the other person has a belief that the Individual will execute the threat.

(C) Pursuant to Welfare and Institutions Code section 6600.1, if the victim of an underlying offense that is specified in Welfare and Institutions Code section 6600, subdivision (b), is a child under the age of 14, the offense shall constitute a "sexually violent offense" for purposes of Welfare and Institutions Code section 6600.

(D) The Evaluator shall conclude with a definitive, short-answer "Yes" or "No" whether the Individual has met Criterion A.

(2) The Criterion B subsection shall provide an analysis and a conclusion of whether the Individual has a DMD that predisposes the Individual to the commission of criminal sexual acts pursuant to Welfare and Institutions Code section 6600. The Evaluator shall determine whether the Individual has a DMD in accordance with the following standards and definitions.

(A) Diagnosed Mental Disorder (DMD) is defined as a congenital or acquired condition affecting the emotional or volitional capacity of the Individual that predisposes the Individual to the commission of criminal sexual acts to a degree such that the Individual is a menace to the health and safety of others. The future criminal sexual acts to which the Evaluator determines the Individual is predisposed need not be violent in nature.

(B) This subsection shall include diagnostic tools and literature upon which the Evaluator relied upon. The Evaluator shall reference consensus-based diagnostic tools from the professions of psychiatry or psychology, including but not limited to the Diagnostic and Statistical Manual of Mental Disorders or the International Classification of Diseases. The Evaluator may also consider additional evidence in the clinical or empirical literature that is relevant to the Evaluator's assessment of psychiatric diagnoses.

(C) This subsection shall include evidence of the nexus between the Individual's DMD, his or her emotional or volitional capacity, and criminal sexual acts.

1. Emotional capacity is defined as an understanding or appreciation of consequences. Impaired emotional capacity is a defective understanding or appreciation of consequences which may occur as the result of an intellectual or emotional impairment.

2. Volitional capacity is defined the ability to control behavior. Impaired volitional capacity is serious difficulty controlling behavior as demonstrated by an

Individual's propensity to act impulsively or an Individual's failure to conform his or her behavior to the law despite the risk of criminal punishment. An absolute lack of control is not necessary to find impaired volitional capacity.

(D) This subsection shall include the Evaluator's determination of whether the Individual has a DMD. To make that determination, the Evaluator shall review the Individual's background, including but not limited to the Individual's mental health history, medical history, and criminal history. The Evaluator may also consider the Individual's self-report and available records. It may include but is not limited to the following:

1. The Individual's developmental history, including but not limited to: early development, childhood and family dynamics, educational history, exposure to domestic or community violence, past trauma, and any history of emotional, physical, or sexual abuse or neglect;

2. The Individual's employment history, including but not limited to: legal employment, illegal means of earning income, work disciplinary issues, and military history;

3. The Individual's relationship history, including but not limited to: intimate relationships, current family relationships, and community supports;

4. The Individual's sexual history, including but not limited to: the sexual development, sexual relationship history, current and past sexual functioning or dysfunction, the nature of sexual fantasies and interests including atypical sexual interests or a paraphilia or paraphilic disorder, and if available, the results of sexual interest testing which may include, but is not limited to, penile plethysmograph, polygraph, or visual reaction time measures;

5. The Individual's psychiatric history, including but not limited to: current and past psychiatric diagnoses or symptoms, current and past history of psychiatric treatment, current and past history of sex offender treatment, and current and past history of substance abuse treatment;

6. The Individual's relevant medical history;

7. The Individual's substance use history, including but not limited to: the age of onset; duration of use; severity or frequency of use; effects of use on functioning, including but not limited to sexual functioning, cognitive process, affective regulation, propensity for violence, and impulse control; and other substance use criteria cited in professional consensus diagnostic manuals;

8. The Individual's juvenile and adult criminal history which may be based upon both the Individual's self-report and any available criminal history records that corroborate the Individual's self-report, including but, not limited to allegations; arrests; charges; convictions; violations of rules in institutions such as group home, jail, juvenile or adult correctional facility, or psychiatric hospital; and parole or probation violations. The Evaluator shall also note any limitations of the forensic evidence relied upon; and

9. When feasible, the Evaluator's mental status examination of the Individual. The Evaluator may supplement his or her mental status examination with a structured mental status instrument. The mental status examination shall include but, is not limited to consideration of the Individual's physical appearance, level of alertness,

awareness of their surroundings, attentional capacities, cooperation, thought organization, mood and affect, behavior, memory functioning, ability to communicate, and approach to the interview or specific interview.

(E) This subsection shall include whether the Individual has met the criteria for a psychiatric diagnosis or a diagnosis under consideration and whether the diagnosis or diagnoses affect the emotional or volitional capacity of the Individual and predisposes him or her to the commission of criminal sexual acts to a degree such that the Individual is a menace to the health and safety of others. For the Evaluator to find that an Individual is a menace to the health and safety of others, a recent overt act while the Individual is in custody is not required.

(F) The Evaluator shall conclude with a definitive, short-answer "Yes" or "No" whether the Individual has met Criterion B.

(3) The Criterion C subsection shall provide an analysis and conclusion of whether the Individual, without appropriate treatment and custody, is likely to engage in sexually violent predatory criminal behavior as a result of his or her DMD. The Evaluator shall address Criterion C regardless of the Evaluator's conclusion of Criterion B.

(A) "Likely" means that as a result of a current mental disorder that predisposes the Individual to commit violent sex offenses, the Individual presents a substantial danger, which means a serious and well-founded risk. "Likely" does not require that the risk of re-offense must be higher than 50 percent or more likely than not. To assess the Individual's likelihood, the Evaluator may review all available forensic evidence, and relevant clinical information and use empirically-derived risk estimation tools or factors. There is no specific timeframe in considering the Individual's likelihood of engaging in sexually violent criminal behavior.

(B) This subsection shall also address whether the Individual's sexually violent offenses are likely to be predatory, using the definition of "likely" in subdivision (e)(3)(A), and the definition of "predatory" in Welfare and Institutions Code section 6600, subdivision (e). In determining whether sexual crimes are likely to be predatory, the Evaluator may also consider the Individual's prior sexual crimes that were not predatory.

(C) This subsection shall address whether the Individual is amenable to voluntary treatment. The Evaluator shall use his or her professional judgment to determine whether an Individual's expressed desire to seek supervision and treatment in the community without the SVP commitment is meaningful, sincere, and sufficiently addresses the Individual's risk. The Evaluator shall address whether the Individual can be safely treated in the community and consider the following factors to determine whether a proposed voluntary plan, if any, provides sufficient reduction of risk to reoffend:

1. The availability, effectiveness, safety, and practicality of community treatment for the Individual's particular DMD;

2. Whether, despite his or her DMD, the Individual retains volitional capacity to voluntarily pursue such treatment;

3. The intended and collateral effects of such treatment and the influence of those effects on a reasonable expectation that one would voluntarily pursue it;

4. The Individual's progress, if any, in any mandated sex offender treatment program in which the Individual has already participated; and

5. The Individual's expressed intent, if any, to seek out and submit to any necessary treatment, whatever its effects, and any other facts bearing on the credibility and sincerity of such an expression of intent.

(D) This subsection shall consider any factor relevant to whether, if free in the community without any conditions, supervision, monitoring, or mandatory treatment at the Department of State Hospitals, the Individual is a substantial danger to reoffend.

(E) The Evaluator shall conclude with a definitive, short-answer "Yes" or "No" whether the Individual has met Criterion C.

(f) The Conclusion section shall summarize the Evaluator's findings and provide a definitive, short-answer "Yes" or "No" as to whether the Individual meets the Criteria as a Sexually Violent Predator pursuant to Welfare and Institutions Code section 6600.

NOTE: *Authority cited: Sections 4005.1, 4027 and 4101, Welfare and Institutions Code. Reference: Sections 6600, 6601, 6602, 6603 and 6604.9, Welfare and Institutions Code; People v. Superior Court (Ghilotti) (2002) 27 Cal.4th 888; People v. Torres (2001) 25 Cal.4th 680; and People v. Hurtado (2002) 28 Cal.4th 1179.*

REGULATORY HISTORY

§§ 4011, 4012, 4013, 4014, 4014.1, 4015: New sections filed 1-15-2019; operative 4-1-2019 (Register 2019, No. 3). OAL Matter Number 2018-1130-06. Effective Date: April 1, 2019.

§§ 4000–4005: New Chapter 15 filed 2-6-2009 as an emergency; operative 2-6-2009 (Register 2009, No. 6). Certificate of Compliance transmitted to OAL 7-31-2009 and filed 9-14-2009 (Register 2009, No. 38).

Source: Final Regulation Text, Sexually Violent Predator Standardized Assessment Protocol Regulation, California Department of State Hospitals, approved by the California Office of Administrative Law, January 15, 2019. Cal. Code Regs., tit. 9, §§ 4011–4014.